DEEPENING THE LEGAL UNDERSTANDING OF BIAS: ON DEVALUATION AND BIASED PROTOTYPES

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I. INTRODUCTION

The limits of contemporary antidiscrimination law are exceedingly narrow. There is a wide gulf between conduct that may be popularly regarded as racist or sexist and that which is prohibited by law, regardless of whether we focus on constitutional mandates or on the somewhat broader reach of important antidiscrimination laws, such as Title VII of the Civil Rights Act of 1964.[1] To be sure, there is a nearly comprehensive ban on the use of explicit classifications by legislative bodies[2] and on the use of formal policies by private entities, such as employers,[3] that expressly

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1. 42 U.S.C. §§ 2000e–2000e-17 (1994).

2. *See* Korematsu v. United States, 323 U.S. 214 (1944). *Korematsu*, the Japanese exclusion case, was the last time the Supreme Court upheld a race-specific statute disadvantaging a racial minority under the strict scrutiny/compelling state interest standard used to judge the constitutionality of racial classifications. The Court's somewhat more lenient stance toward gender classifications through use of its intermediate scrutiny test has also resulted in the invalidation of most gender-specific laws, except for the few that the Court regards as implicating real (i.e., biologically based) differences between the sexes. *See* Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983).

3. Under Title VII, for example, all racially based policies are specifically prohibited, with a narrow exception for carefully crafted affirmative-action programs. *See* United Steelworkers v. Weber, 443 U.S. 193, 208 (1979). Although not absolutely prohibited, explicit sex-based policies are invalid

provide for different standards for minorities, women, or other traditionally disfavored groups. Aside from this insistence on formal or facial equality, however, the protection of the law is thin.

The legal construct used most consistently to address discrimination is "intentional disparate treatment." Although specific legislation or judicial interpretations of particular governing standards at times seem to embody different principles,[4] the ban against intentional disparate treatment goes a long way toward explaining the law's basic approach to claims of bias. In its simplest formulation, the ban against disparate treatment requires that different social groups (whether men and women, minority group members and whites, or other pairings of traditionally favored and disfavored groups) be subject to the same rules and standards, at least in circumstances in which the individuals or groups can be said to be similarly situated.[5] Most often courts also insist that there be an additional showing that the disparate or different treatment is the product of deliberate or conscious decisionmaking, to satisfy the requirement that the discrimination was "intentional." Most notably, in constitutional adjudication since *Washington v. Davis*,[6] the Court has been strict in demanding proof of

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under Title VII unless the employer proves that the policy is a bona fide occupational qualification (BFOQ exception). *See* Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991). On rare occasions, employers have been successful in establishing a BFOQ. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977) (excluding women from positions as prison guards in maximum security facility); Healey v. Southwood Psychiatric Hosp., 78 F.3d 128 (3d Cir. 1996) (requiring assignment of both male and female counselors for disturbed adolescents); Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 705 (8th Cir. 1987) (discharge of unmarried pregnant teacher who served as "role model" for teenage girls). *See also* KATHARINE T. BARTLETT & ANGELA P. HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 224–30 (2d ed. 1998) (discussing BFOQ cases).

4. For example, many scholars have argued that principles of antisubordination, rather than difference-style equality principles, ought to guide (or at least supplement) constitutional and statutory interpretation. *See, e.g.*, CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 40 (1987); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). *Cf.* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994) (defending a view of equality that opposes the creation or maintenance of social castes). For a discussion of these more "result-based" theories, see ANDREW KOPPLEMAN, ANTIDISCRIMINATION LAW & SOCIAL EQUALITY 57–99 (1996).

5. The classic definition of disparate treatment is found in the Title VII case *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977):

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Id. at 335 n.15.

6. 426 U.S. 229 (1976).

discriminatory intent, cutting off many potential claims in which unequal treatment stems from indifference, neglect, or structural inequities.[7]

In Title VII disparate treatment cases, the meaning of "intentional discrimination" is more contested. There is currently a debate as to whether "unconscious disparate treatment" is actionable under the statute[8] in cases in which the plaintiff proves that race, sex, or some other prohibited factor caused the unequal treatment, even if the decisionmaker did not desire or was not fully aware of the impact of his or her conduct. By a slim majority, however, the Supreme Court's pronouncement in *St. Mary's Honor Center v. Hicks* indicates that plaintiffs cannot be confident of winning individual disparate treatment cases unless they can marshal convincing "state of mind" proof of group-based animus or hostility in addition to race-based disparate treatment.[9]

Admittedly, there are pockets of legal protection against stereotyping[10] and some legal recognition of disparate impact, a theory of

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7. *See generally* Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977) (exploring implications of intent requirement in equal protection litigation).

8. Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1131 (1999); Michael Selmi, *Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233 (1999) (response to Professor Wax). *See also* Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 179–83 (1992); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995); Ann C. McGinley, ¡Viva La Evolución! *Recognizing Unconscious Motive in Title VII*, 9 CORN. J.L. & PUB. POL'Y 415 (2000); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 900–15 (1993); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989).

9. 509 U.S. 502, 520 (1993). For commentary on *Hicks*, see Deborah Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229 (1995), and Deborah A. Calloway, St. Mary's Honor Center v. Hicks*: Questioning the Basic Assumption*, 26 CONN. L. REV. 997 (1994). One possible exception to the requirement of proof of intent in disparate treatment cases may be found in the Supreme Court's analysis of sexual harassment claims. Recently the Court stated that "[s]exual harassment under Title VII presupposes intentional conduct," signaling that there need be no further showing of group-based hostility or animus in this category of cases. *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 756 (1998). Nevertheless, as demonstrated by the torrent of scholarship surrounding the Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), it is still far from clear whether the courts will insist that plaintiffs present hostile "state of mind" evidence, at least in same-sex sexual harassment cases. *See, e.g.*, Rebecca Hanner White, *There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725 (1999) (engrafting *Hicks* requirement of proof of intent onto sexual harassment claims).

10. Social psychologists use the term "stereotyping" broadly to describe the "most cognitive component" of category-based reactions to "people from groups perceived to differ significantly from one's own." Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 357 (Daniel Gilbert et al. eds., 4th ed. 1998). They distinguish stereotyping from "prejudice," the most affective component of bias, and "discrimination," the most behavioral component of bias. *Id.*

liability that reaches unintentional discrimination when facially neutral policies have adverse effects on a disfavored social group.[11] But each of these corners of the law is narrowly circumscribed. Compared to the prohibition against disparate treatment, the legal constraints against stereotyping and disparate impact are less-uniformly imposed and there is a great deal of confusion as to the prerequisites for invoking these broader protections.[12]

In constitutional jurisprudence, the distaste for stereotyping tends principally to supplement the mandate against explicit disparate treatment. The Court's most forceful condemnations of gender stereotyping and habitual ways of thinking about women, for example, are found in explicit classification cases, where the Court's main objective was to undercut the rationality of formal legislative schemes and to provide support for striking down explicit gender lines.[13] Rarely is a facially neutral rule or a standard that applies equally to men and women struck down as discriminatory because it finds its justification in gender stereotypes.[14] The current legal

11. In *Teamsters*, the Court distinguished disparate impact cases from claims of disparate treatment. Disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory." *Teamsters*, 431 U.S. at 335–36 n.15 (internal cross-reference omitted). The classic disparate impact case is *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), holding that an employer could not lawfully require entry-level laborers to possess a high school diploma and score above the median on a general aptitude test. The qualifications were invalidated because they screened out a disproportionate number of African Americans and were not related to the specific tasks of the job. *Id.* at 431–33.

12. For commentary on the difficulties determining the proper scope and application of disparate impact theory, see Paulette M. Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. PITT. L. REV. 555 (1985); Paul N. Cox, *Substance and Process in Employment Discrimination Law: One View of the Swamp*, 18 VAL. U. L. REV. 21, 45–118 (1983); Ramona L. Paetzold & Steven L. Willborn, *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. REV. 325 (1996). For commentary on stereotyping, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471 (1990); Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. REV. 345 (1980); Heather K. Gerken, Note, *Understanding Mixed Motives Claims Under the Civil Rights Act of 1991: An Analysis of Intentional Discrimination Claims Based on Sex-Stereotyped Interview Questions*, 91 MICH. L. REV. 1824 (1993).

13. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975).

14. *See, e.g.*, Pers. Adm'r v. Feeney, 442 U.S. 256 (1979). In *Feeney*, the Court rejected a challenge to a sweeping veterans' preference in Massachusetts civil service jobs that virtually locked out women from upper-level positions. *Id.* Because the preference was given equally to male and female veterans, it was treated differently by the Court than an explicit sex-based classification. *See id.* at 273–74. Significantly, the Court found no discriminatory purpose underlying the preference.

disapproval of gender stereotyping is insufficient, for example, to challenge the use of policies based on implicit male norms without some further showing of hostility or animus against women.[15]

Even under Title VII, where the Court has provided its most extensive critique of gender stereotyping in *Price Waterhouse v. Hopkins*,[16] the doctrine that has emerged treats evidence of stereotyping primarily as a method of proving discriminatory intent in a narrow class of mixed-motivation cases.[17] It is far from clear that Title VII requires employers to take active steps to decrease the likelihood that employment decisions are influenced by stereotypes about a group, particularly when decisionmakers do not consciously rely on such damaging generalizations.[18]

Most importantly, in the last decade, the promise and power of disparate impact theory has been seriously undermined. The courts have been reluctant to extend disparate impact too far beyond its "home" in Title VII. They have ruled that this theory of liability is not available under the Reconstruction-era civil rights statutes (42 U.S.C. § 1981[19] and 42 U.S.C.

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concluding that the preference was passed to reward veterans, not to hurt women. *See id.* at 274–75. The fact that women had historically been excluded from military service by caps on the number of female volunteers and that Massachusetts did not apply the preference to traditionally female jobs was insufficient to persuade the Court that the law was motivated at least in part by sex discrimination or sexual stereotypes. *See id.* at 283–84 & n.1 (Marshall, J., dissenting). For a discussion of the gender-based assumptions behind veterans' preference laws in America, see LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 260 (1998) (arguing that the Massachusetts veterans' preference was influenced by "deep-rooted assumptions that were central to the old law of domestic relations: that women are covered by husbands' civic identity; that they experience state power through their fathers' and husbands' service").

15. For example, California's exclusion of pregnancy from the state's disability insurance program was held constitutional in *Geduldig v. Aiello*, 417 U.S. 484 (1974), prompting numerous commentators to criticize the Court's tacit acceptance of men's reproductive processes as normal or standard while treating pregnancy as "unique." *Id.* at 497 n.20. Citing over two dozen articles critical of *Geduldig*'s result and reasoning, Sylvia Law concluded that denunciation of the decision had become a "cottage industry." Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984).

16. 490 U.S. 228 (1989).

17. Most recent lower court cases have narrowed the application of the more plaintiff-oriented "mixed motivation" framework to instances in which plaintiffs have sufficient *direct evidence* that sex, race, or some other prohibited factor played a role in the decision. *See, e.g.*, Miller v. Cigna Corp., 47 F.3d 589, 597 n.9 (3d Cir. 1995) (en banc); Randle v. La Salle Telecomms., Inc., 876 F.2d 563 (7th Cir. 1989). There is, however, considerable debate as to what qualifies as "direct" evidence. *See* MICHAEL J. ZIMMER, CHARLES A. SULLIVAN, RICHARD F. RICHARDS & DEBORAH A. CALLOWAY, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 179–82, 204–06 (5th ed. 2000) (collecting and discussing "direct evidence" cases).

18. *See* Martha Chamallas, *Listening to Dr. Fiske: The Easy Case of* Price Waterhouse v. Hopkins, 15 VT. L. REV. 89 (1990); Krieger, *supra* note 12.

19. Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982).

§ 1983[20]) and probably may not be invoked to prove age discrimination under the Age Discrimination in Employment Act (ADEA).[21] Were it not for the congressional decisions to write disparate impact theory into the Americans with Disabilities Act (ADA),[22] the Voting Rights Act,[23] the 1991 amendments to Title VII,[24] and the fair housing and lending laws,[25] this effects-based standard might have quietly disappeared from anti-discrimination law. Even with respect to Title VII, disparate impact cases are discouraged by the stringent burden that courts now tend to impose on plaintiffs to provide refined statistical proof of group adverse impact as part of the prima facie case.[26] For example, an empirical study by Professor John Donahue found that disparate impact cases accounted for less than two percent of the federal employment discrimination caseload in 1989.[27]

Although courts still frequently state that the law is designed to capture subtle as well as overt forms of discrimination,[28] a common complaint among feminist and critical race commentators is that current legal doctrines are inadequate to handle contemporary manifestations of bias against women, racial minorities, and other disfavored social groups. Two themes are often sounded in the critical commentaries: 1) new-style discrimination is pervasive yet subtle and hard to distinguish from

20. Pers. Adm'r v. Feeney, 442 U.S. 256, 272 (1979).

21. 29 U.S.C. §§ 621–634 (1994). The Supreme Court has expressly reserved the issue. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). Since *Biggins*, two appellate courts have concluded that disparate impact is inapplicable to ADEA cases. *See* Ellis v. United Airlines, Inc., 73 F.3d 999, 1007 (10th Cir. 1996); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1078 (7th Cir. 1994).

22. 42 U.S.C. § 12112 (b)(3), (6) (1994).

23. 42 U.S.C.§ 1973 (a), (b) (1994).

24. 42 U.S.C. § 2000e-2(k)(1)(A) (1994).

25. *See* 42 U.S.C. §§ 3601–3631 (1994) (Fair Housing Act of 1968); 15 U.S.C. § 1691 (1994) (Equal Credit Opportunity Act of 1974). For a discussion of the confused state of disparate impact litigation under these two statutes, see Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409 (1998).

26. *See* Flagg, *supra* note 8, at 2025–30 (discussing technical barriers to establishing successful disparate impact claim); Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313 (2000) (discussing "small numbers problem" in proving disparate impact and disparate treatment claims).

27. John J. Donahue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989 (1991).

28. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) ("Title VII tolerates no racial discrimination, subtle or otherwise"); Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082 (3d Cir. 1996) ("[R]egardless of the form that discrimination takes . . . the law's prohibition remains unchanged."); Hairston v. McLean Trucking Co., 520 F.2d 226, 233 (4th Cir. 1975) ("Title VII condemns subtle as well as gross discrimination[.]").

"normal" ways of doing business and interacting socially,[29] and 2) despite several decades of enforcement of antidiscrimination laws, entrenched forms of bias are not just being phased out, but are simultaneously being reproduced in updated forms.[30]

In this Article, I will not directly address the important point that antidiscrimination law is inadequate because it targets mainly intentional discrimination, missing the more prevalent contemporary forms of bias that are often nondeliberate or unconscious.[31] Rather, my interest here is in exploring different forms of bias, beyond disparate treatment and disparate impact, that have not adequately been theorized in the law. Clearly, insofar as the law requires that there be "state of mind" evidence showing hostility or animus before there can be a finding of intentional discrimination, there is a significant legal impediment to addressing the new forms of bias I discuss herein, which are not the product of such deliberate discrimination. However, I do not believe that my discussion is wholly impractical, precisely because the meaning of intent has always been contested, particularly in Title VII cases. Sometimes plaintiffs prevail even though there is no hostility or animus. In some disparate treatment cases, it is enough to show that race or gender "caused" the employer to treat the

29. Some writers, for example, have explored how racial and gender privilege (the flip side of racial and gender discrimination) allow dominant groups to receive social advantages in everyday interactions without perceiving them as special benefits. *See* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 107–12 (1999) (analyzing literature on white privilege). *See also* BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW 144–48 (1998); PEGGY MCINTOSH, WHITE PRIVILEGE AND MALE PRIVILEGE: A PERSONAL ACCOUNT OF COMING TO SEE CORRESPONDENCES THROUGH WORK IN WOMEN'S STUDIES (Wellesley Coll. Ctr. for Research on Women, Working Paper No. 189, 1988); Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637 (1999); Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other Isms)*, *in* STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 85, 87 (1996); Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. (forthcoming Spring 2001) (manuscript at 43–47, on file with the *Southern California Law Review*); Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217, 235 (1993).

30. *E.g.*, DERRICK BELL, GOSPEL CHOIRS: PSALMS OF SURVIVAL IN AN ALIEN LAND CALLED HOME 54 (1996); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

31. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). One genre of unconscious racism, known as "aversive racism," causes a person who professes not to embrace racist beliefs to act in a way that "tries to ignore the existence of black people, tries to avoid contact with them, and at most to be polite, correct and cold in whatever dealings are necessary between the races." JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY 54 (1970). Such aversive racism is said to be far more common in contemporary society than overt racism in which a person deliberately tries to put down blacks or openly proclaims a belief in white supremacy. *See* KOPPLEMAN, *supra* note 4, at 26.

plaintiff differently, even if the employer was not aware of the operation of the race or gender factor.[32] Such unconscious disparate treatment often takes the form of cognitive bias, where stereotypes about the group infect how decisionmakers perceive and interpret events, remember facts, and later make judgments.[33] Such action can plausibly be labeled "intentional," because in such cases the decisionmaker acts deliberately rather than accidentally and the decisionmaking process is infected by race or gender bias. Thus, even nominally within an intentional discrimination framework, there may be a shift in emphasis from state of mind to causation.[34] The larger issue here is whether antidiscrimination law should focus on what social psychologists call the affective component of bias (prejudice or hostility) or the cognitive component of bias (stereotyping, devaluation, and the use of biased prototypes).[35] Mapping the contours of new forms of cognitive bias thus might contribute something useful to the debate over the meaning of intentional discrimination.

Recently, I reviewed a large sample of the "applied" feminist legal scholarship addressing persistent substantive inequalities in the major spheres of women's lives relating to money, sex, family, and reproduction.[36] What struck me most about this diverse body of work was that it often centered on gender-linked injuries where there was no precise male analogue and tended to explore the effects of sexism on (largely)

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32. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 288–94 (1997).

33. *See* Krieger, *supra* note 12, at 1199–211.

34. Linda Krieger has proposed that such a shift in emphasis from intent to causation be made in Title VII disparate treatment litigation:

> To establish liability for disparate treatment discrimination, a Title VII plaintiff would simply be required to prove that his group status *played a role* in causing the employer's action or decision. Causation would no longer be equated with intentionality. The critical inquiry would be whether the applicant or employee's group status "made a difference" in the employer's action, not whether the decisionmaker intended that it make a difference.

Id. at 1242. *See also* Eisenberg, *supra* note 7, at 57–62 (advocating application of tort-like causation requirements to govern equal protection challenges).

35. *See supra* note 10. It should be noted, however, that the line between rationality and emotion, between cognitive processes and affect, is a lively subject of investigation in fields such as neurology and social psychology. Researchers now believe that "certain aspects of the process of emotion and feeling are indispensable for rationality." ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN xiii (1994). *See also* Melissa L. Finucane, Ali Alhakami, Paul Slovic & Stephen M. Johnson, *The Affect Heuristic in Judgments of Risks and Benefits*, 13 J. BEHAV. DECISION MAKING 1 (2000) (discussing the guiding role of positive and negative feelings in decisionmaking). Lawyers and judges, however, often draw a distinction between hostility, animus, and negative feelings toward a social group (i.e., prejudice) and the largely unconscious processes of selectively noticing, remembering, and processing information about social groups (i.e., cognitive bias or unconscious stereotyping).

36. *See* CHAMALLAS, *supra* note 29, at 171–306.

single-sex groups. Not surprisingly, writings on such topics as rape,[37] domestic violence,[38] sexual harassment,[39] household labor,[40] occupational segregation,[41] abortion,[42] and welfare reform[43] seldom discuss intentional disparate treatment of women because that particular comparative framework has little to offer in such contexts. The ban on intentional disparate treatment, even augmented by some restrictions on gender stereotyping and pockets of disparate impact liability, is not nearly expansive enough to respond to the varieties of contemporary gender bias that have little to do with affording women access to traditionally male domains. Beyond acknowledging that bias need not be deliberate or intentional to cause injury and create formidable barriers, it is important to develop new legal concepts to express contemporary patterns.

The two forms of bias I develop in this Article—devaluation and biased prototypes—are best described as forms of cognitive bias. Although I draw upon research in social and cognitive psychology to understand their operation,[44] my description of these two forms of bias proceeds largely from my analysis of cases and legal commentary.

II. DEVALUATION

Unlike disparate treatment, devaluation is not strictly speaking a legal term. The term, however, is commonly used by lawyers, commentators,

37. *See, e.g.*, Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599 (1991); Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127 (1992); Robin L. West, *Legitimating the Illegitimate: A Comment on* Beyond Rape, 93 COLUM. L. REV. 1442 (1993).

38. *See, e.g.*, Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); Victoria Nourse, *Passion's Progress: Modern Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997).

39. *See, e.g.*, Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

40. *See, e.g.*, Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994).

41. *See, e.g.*, Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

42. *See, e.g.*, Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

43. *See, e.g.*, Martha Albertson Fineman, *The Nature of Dependencies and Welfare "Reform"*, 36 SANTA CLARA L. REV. 287 (1996); Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817 (1994).

44. For two particularly useful introductions to topics in the psychological literature relevant to antidiscrimination law, see SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION (2d ed. 1991); THE HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 10.

and social activists to express bias that may or may not be legally prohibited.[45] Sometimes the term is used in a general sense to describe the cause or motivating force behind the unfair treatment of individuals from a disfavored social group. One writer, for example, has used the term in a very broad sense to cover any situation in which the lives or interests of minorities were "systematically and institutionally given less weight"[46] than those of the dominant group, even when the bias took the form of disparate treatment. In this Article, I restrict the use of the term "devaluation" to describe situations other than clear-cut cases of disparate treatment where the direct victim is a member of a disfavored class. So defined, the examples of devaluation are various, yet they all seem to pose doctrinal difficulties.

A. DEVALUATION COUPLED WITH EXPLICIT CLASSIFICATIONS

A good starting point for discussion of the legal treatment of devaluation is a line of Supreme Court equal protection cases starting in the mid-1970s that challenged government benefit schemes premised on traditional assumptions about the social roles of men and women.[47] Each of the statutes at issue in the cases involved a familiar gender stereotype, namely the presumption that the man is (or should be) the breadwinner in a family, while the woman performs the domestic roles of homemaker and

45. For example, there is rich literature on the devaluation of feminine qualities and activities and concepts associated with "the feminine" and the corresponding privileging of "the masculine." *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 3 (1995); Lucinda M. Finley, *Sex-Blind, Separate but Equal, or Anti-Subordination? The Uneasy Legacy of* Plessy v. Ferguson *for Sex and Gender Discrimination*, 12 GA. ST. U. L. REV. 1089, 1105–06 (1996); Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 171, 209 (1996); Deborah Zalesne, *When Men Harass Men: Is It Sexual Harassment?*, 7 TEMP. POL. & CIV. RTS. L. REV. 395, 397, 409 (1998). On the devaluation of black motherhood, see Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871 (1994) [hereinafter Roberts, *Black Mothers' Work*]. On the devaluation of women's sexuality, see CHAMALLAS, *supra* note 29, at 230–36; Alexandra Wald, *What's Rightfully Ours: Toward a Property Theory of Rape*, 30 COLUM. J.L. & SOC. PROBS. 459, 483 (1997).

46. Adeno Addis, *Recycling in Hell*, 67 TUL. L. REV. 2253, 2255 n.8 (1993). *See also* KOPPLEMAN, *supra* note 4, at 10 (stating that the movement to end discrimination "represents a claim of enormous moral power: the demand that society recognize the human worth of all its members, that no person arbitrarily be despised or *devalued*") (emphasis added).

47. *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

caretaker of children.[48] By the time these cases were decided, the Court had embraced heightened scrutiny for explicit gender classifications and made it clear that such classifications would be struck down if they were supported only by "archaic and overbroad" generalizations about the appropriate roles of men and women.[49] In that respect, the cases looked like easy winners for the challengers: The confining stereotype of women as naturally domestic and maternal was the primary target of women's rights litigators such as Ruth Bader Ginsburg, who brought two of the cases before the Court.[50] The tricky aspect of the cases, however, was that each could be viewed as involving discrimination against men, rather than women, and it was far from clear that heightened scrutiny was appropriate for such "benign" gender classifications. Nevertheless, the benefit schemes were struck down in each case as impermissible gender discrimination.

These early cases represent rare instances in which devaluation was held to violate the law. They are noteworthy because they indicate that, in some contexts at least, the harm of devaluation has been acknowledged and classified as actionable bias. In the first such case, *Weinberger v. Wiesenfeld*, a woman died in childbirth, leaving her husband to care for their infant.[51] The woman had worked as a teacher and had been the principal source of economic support for her family. Her husband, however, was denied social security survivors' benefits under the prevailing scheme that restricted such benefits to widows who cared for children after their husbands' deaths. The doctrinal dilemma faced by the Court was how to characterize the discrimination at issue in the case.

From the perspective of the social security beneficiaries, the statute seemed clearly to favor women (i.e., widows) and to discriminate against men (i.e., widowers). After all, it was men who suffered direct economic

48. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.4.3, at 609–10 (1997) (discussing the Supreme Court's rejection of the gender stereotype of economically dependent women and economically independent men). In contrast to the Court's disapproval of the breadwinner/homemaker model, on occasion the Court has treated mothers and fathers differently in their role as caretakers of children. *See* Miller v. Albright, 523 U.S. 420 (1998) (upholding statute that conferred citizenship on child born outside the United States if the mother (but not the father) was a citizen); Lehr v. Robertson, 463 U.S. 248, 260 (1981) (upholding law permitting child to be adopted without securing consent of the father, if father had not lived with the mother or registered with the state); Parham v. Hughes, 441 U.S. 347 (1979) (upholding law that permitted mothers but not fathers to sue for wrongful death of an out-of-wedlock child).

49. Schlesinger v. Ballard, 419 U.S. 498, 508 (1975). *See also* Frontiero v. Richardson, 411 U.S. 677, 688–89 (1973); Reed v. Reed, 404 U.S. 71, 76–77 (1971).

50. Ginsburg represented the plaintiffs in *Wiesenfeld* and *Goldfarb*. *See* Deborah L. Markowitz, *In Pursuit of Equality: One Woman's Work to Change the Law*, 11 WOMEN'S RTS. L. REP. 73, 87–89, 91–93 (1989).

51. *Wiesenfeld*, 420 U.S. at 639.

loss by the denial of government benefits. When the statutory scheme was viewed from the perspective of the now-deceased workers who had paid social security taxes, however, it looked more like discrimination against women workers. The argument was that the labor of similarly situated employed men and women yielded greater benefits to the man's family than to the woman's family.

In defense of the statutes, the Government argued that the Court ought to view the statutes as discriminating against the surviving male beneficiaries, for the simple reason that social security benefits are noncontractural in nature and not tied directly and exclusively to worker contributions.[52] Since the deceased woman had no right to the survivor benefits while she was living (nor did her estate receive the benefits after death), the Government argued that it was proper to view this explicit disparate treatment as targeted against men (the traditionally favored group) to the benefit of the traditionally disfavored class of women.

In rejecting the Government's argument, the Court instead chose to highlight the injury done to working women, an injury I consider to be a form of devaluation. For Justice Brennan, the empirical fact that women were more often financially dependent on their husbands could not "suffice to justify *the denigration of the efforts of women* who do work and whose earnings contribute significantly to their families' support."[53] For the majority, the principal evil of the statutory scheme was that the work of women was treated as less valuable than the work of men. The majority regarded the discrimination as directed at employed women and its decision insured that this nontraditional group of women was not disadvantaged vis-à-vis male employees. The focus on employed women permitted the Court to avoid deciding whether a gender classification that disadvantaged men who took on "maternal" roles would in itself be unconstitutional,[54] absent the attendant devaluation of women's labor.

In the next few years, the Court invalidated two similar gender classifications in which the "direct" harm of a benefits scheme fell on surviving male beneficiaries. *Califano v. Goldfarb* closely resembled

52. *See id.* at 646–47.

53. *Id.* at 645 (emphasis added).

54. The contemporary Court now appears to apply the same intermediate level of scrutiny whether the classification disadvantages men or women. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (using peremptory strikes to exclude men from the jury in paternity case held unconstitutional); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (exclusion of male student from all-female nursing program held unconstitutional). However, the Court still tolerates some difference of treatment between nonmarital mothers and fathers in cases involving adoption and other rights relating to children. *See* cases cited *supra* note 48.

Wiesenfeld, involving the denial of social security benefits to a surviving husband who could not prove that he had been dependent on his deceased wife's earnings.[55] A presumption of dependency was accorded to all surviving wives, an application of the gendered breadwinner/homemaker presumption that had been built into the social security law over the years. In *Wengler v. Druggists Mutual Insurance Co.*, the Court struck down a state worker-compensation scheme that extended death benefits to all widows but required widowers to prove that they were either dependent or mentally or physically incapacitated.[56] The majority of the Court in each case focused on the unfairness of the scheme to working women. Because the women suffered no tangible economic injury while they were alive, the harm was described somewhat differently than simple disparate treatment, in which a woman receives less money for her services than a similarly situated man. Justice Brennan spoke of denying an employed woman "the dignity of knowing [during her working career] that her social security tax would contribute to . . . her husband's welfare should she predecease him"[57] and discriminating against "one particular category of family—that in which the female spouse is a wage earner covered by social security."[58] Not all members of the Court were willing to view the case from the perspective of the deceased woman worker. In dissent, Justice Rehnquist called the approach "a questionable tool of analysis which can be used to prove virtually anything."[59]

The "presumption of dependency" cases lie at the intersection of disparate treatment and devaluation. From the perspective of the majority, the most troublesome aspect of the statutory scheme was the devaluation of women's labor: the simple fact that the worker was a female meant that her efforts were worth less than a similarly situated male. Even though the devaluation fully materialized only after the woman's death, the Court could see how the scheme nevertheless placed women at a disadvantage compared to men in the workplace. Perhaps because the Court was particularly interested in supporting women's equality in the public sphere in those early years of gender discrimination litigation,[60] it was prepared to treat this type of devaluation as a violation of equal protection.

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55. 430 U.S. 199 (1977).

56. 446 U.S. 142, 147, 152–53 (1980).

57. *Goldfarb*, 430 U.S. at 204, 208 n.5.

58. *Id.* at 209. *See also* Califano v. Westcott, 443 U.S. 76 (1979) (holding Aid to Families with Dependent Children (AFDC) benefits based on father's (but not mother's) unemployment was unconstitutional).

59. *Goldfarb*, 430 U.S. at 239 (Rehnquist, J., dissenting).

60. *See* CHAMALLAS, *supra* note 29, at 32–39.

Compared to other types of devaluation, however, the "presumption of dependency" cases possess a particular structure that makes them easier to fit into the traditional equal protection framework. First, each of the benefit schemes at issue employed explicit gender classifications, i.e., male beneficiaries were explicitly afforded less-favorable treatment than were female beneficiaries. Even though this explicit disparate treatment of men was not regarded by the Court as the principal harm of the statute, it could nevertheless serve to distinguish this line of cases from others that might subsequently come before the Court. These cases can be viewed as devaluation coupled with explicit disparate treatment, or devaluation that results in explicit disparate treatment. Particularly because the "presumption of dependency" had earlier been used in benefit schemes that directly disadvantaged living women workers—most notably the gender-based denial of fringe benefits in *Frontiero v. Richardson*[61]—it was not a big step for the Court to invalidate explicitly gender-based programs that directly disadvantaged men.

Equally as important as the existence of explicit classifications was the fact that the category that was devalued in each instance—work done by women covered by social security or workers' compensation—consisted of a class in which every category member was a woman. The indirect harm of devaluing women's labor affected a group that was exclusively female. This kind of devaluation, although to some extent intangible, nevertheless looked very much like disparate treatment of women as a group.

B. COVERT RACE-BASED DEVALUATION OF RACIAL MINORITIES

Perhaps the most well known case in which the Court rejected a claim of devaluation is *McCleskey v. Kemp*, a race discrimination challenge to Georgia's death penalty.[62] McCleskey's challenge was based on a large-scale empirical study done by Professor David Baldus for the NAACP Legal Defense Fund.[63] Reviewing over 2,000 murder cases that occurred in Georgia in the 1970s, the study showed that defendants charged with killing white victims were 4.3 times more likely to receive a death sentence than defendants charged with killing black victims.[64] The case presented

61. 411 U.S. 677 (1973).

62. 481 U.S. 279 (1987).

63. *See id.* at 286. The study is discussed in DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990).

64. *McCleskey*, 481 U.S. at 287; BALDUS ET AL., *supra* note 63, at 316.

for McCleskey was compelling: The researchers used a sophisticated multiple regression analysis that controlled for 230 nonracial variables that might have explained the racial disparity. Significantly, using the same model, the study found that the race of the defendant was a far less important factor than the race of the victim: Black defendants were only 1.1 times as likely to receive a death sentence as were other defendants.[65]

The Baldus study dramatically illustrated the operation of devaluation in the context of the criminal justice system. The pernicious pattern that emerged from the statistics was that a higher value was placed on the lives of white people than on the lives of black people, as demonstrated by the fact that the taking of a white life was far more likely to merit stiffer punishment. This devaluation based on the "race of the victim" factor was one step removed from ordinary disparate treatment. In an ordinary disparate treatment case, a black defendant claims that he has received a harsher penalty than a similarly situated white defendant received. McCleskey's main argument, however, was not that *his* race had directly affected his sentence, but that racial bias had likely affected the evaluation of the seriousness of his crime, with the effect of devaluing black life relative to white life. It was as if the decisionmakers had created two separate categories of crime: the killing of whites and the killing of blacks. In contrast to disparate treatment, the harm associated with this type of racial devaluation is visited upon persons other than the criminal defendant. The refusal to impose the harshest penalty for the taking of black lives may mean that black communities are less safe and that families and friends of undervalued black victims will suffer emotional pain if they believe that justice was not served. Most importantly, the devaluation also illustrates a greater societal toleration for violence inflicted on blacks, a tolerance which may reinforce a cultural belief in the inferiority of blacks. Professor Randall Kennedy has described this kind of devaluation as "racially selective empathy": "the unconscious failure to extend to [blacks] the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to [whites]."[66]

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65. *McCleskey*, 481 U.S. at 287; BALDUS ET AL., *supra* note 63, at 328–29. The combined factors of the race of the victim and the race of the defendant did, however, correlate with the decision to seek the death penalty. The raw data indicated that the prosecutor sought the death penalty in 70% of the cases involving a black defendant and a white victim, 32% of the cases involving a white defendant and a white victim, 15% of the cases involving a black defendant and a black victim, and 19% of the cases involving a white defendant and a black victim. *McCleskey*, 481 U.S. at 287; BALDUS ET AL., *supra* note 63, at 327 tbl.56.

66. Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1420 (1988) (quoting Paul Brest, *The Supreme Court, 1975 Term—*

Despite the sophistication of the study and the sizeable race disparities documented, the Court ruled 5-4 against McCleskey, finding no equal protection violation. Accepting the soundness of the Baldus study for the sake of argument, the majority held that McCleskey had not proven race discrimination because he could not prove that racial bias had infected the decisionmaking in his individual case. By its very design, a large-scale statistical study such as the one conducted in *McCleskey* could only demonstrate "a *risk* that the factor of race entered into some capital sentencing decisions and a necessarily lesser risk that race entered into any particular sentencing decision."[67] Baldus testified that he could not say to a moral certainty that race had influenced the process in McCleskey's case.[68] Given the circumstances in McCleskey's case, the most that could be said was that there was a substantial risk that he had received the death penalty because his victim was white. The bias uncovered by the Baldus study was covert in nature and arose from the abuse of discretion, rather than from the application of an explicit racial classification. Given that there will inevitably be some instances in which the exercise of discretion is not tainted by race, covert discrimination almost never affects every member of the category. Thus, there was a chance that McCleskey's punishment was unaffected by the race of the victim, a chance that would not have existed if the statutory scheme had been explicit and instructed decisionmakers to take the race of the victim into account in their determinations. To this extent, the case differed from the "presumption of dependency" cases, where it was impossible to escape devaluation because the statute explicitly denied comparable benefits to male survivors and hence automatically devalued the labor of their deceased wives.

Nevertheless, to my mind, the devaluation exposed in *McCleskey* is similar in all important respects to the devaluation in the "presumption of dependency" cases. In each instance, the primary "victims" are not persons directly affected by the statutes at issue, but are people whose lives or activities have been judged to be worth less than members of the more dominant group in society. The price tag placed on women's labor in the early cases was determined by the stereotypical judgment that women's labor was marginal or secondary and need not be "replaced" when the female worker died. The value placed on black life as revealed by the Baldus study was affected by the invidious judgment that it was

Foreword: In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1, 7–8 (1976)) (alterations and citations omitted in original).

67. *McCleskey*, 481 U.S. at 291 n.7.

68. *Id.* at 308–09 & n.29.

permissible to view the death of a white person as an offense more serious than the death of a black person and to reserve the death penalty for these more egregious cases.

That the devaluation in *McCleskey* was not combined with an explicit racial classification should not be determinative. It is true that the defendants affected by the devaluation in *McCleskey* were a mixed racial group, because both white and black defendants who killed white persons were more vulnerable to the death penalty. In contrast, in the "presumption of dependency" cases, the affected group was made up entirely of males. However, for purposes of determining the legal significance of devaluation, it should not matter that the reverberating effects of the devaluation fall most tangibly on members of the favored class only. In fact, one could argue that the effect of the devaluation in *McCleskey* is only the more troublesome because some black defendants will also be harmed. Instead, if the focus is on the class of persons whose lives are devalued (i.e., the crime victims and the deceased workers) in both *McCleskey* and the "presumption of dependency" cases, it is significant that such group is composed entirely of persons from a traditionally disfavored group. At least as far as the Baldus study revealed, the lives of white crime victims were not devalued (compared to blacks) and thus the category that was devalued—"black life"—described the race of every category member.

The further distinctive feature of *McCleskey*—that the devaluation occurred as a result of a covert abuse of discretion rather than an overt statutory direction—also strikes me as substantively insignificant. There is no consensus that explicit classifications impose greater or different harms than covert racial classifications and no legal basis for treating covert discrimination differently than overt discrimination, at least where there is proof of discriminatory intent. Like disparate treatment, devaluation can be accomplished through statutory direction or abuse of discretion. The fact that the devaluation in *McCleskey* might not have occurred in every case may not be as crucial as the Court suggests. Presumably, the Court would have struck down a scheme that *explicitly authorized* jurors and other legal actors to take the race of the victim into account in deciding whether to impose the death penalty, even if there was no further showing that the race of the victim had in fact tainted the judgment in the individual case. Thus, I suspect that it was the formalistic distinction between explicit and covert classifications, and the fact that this case involved devaluation rather than disparate treatment, that made the case so difficult for the Court. There is a strong argument to be made that proof as compelling as the regression analysis in *McCleskey* should make us highly suspicious that there is bias

in the system, without a further showing that the harm occurred in each individual case. The high risk that devaluative judgments about the lesser worth of black life affected a large number of cases should have been enough to make the Court hesitate to authorize the death penalty *if* it believed that racial devaluation was an injury on par with disparate treatment. The Court's unwillingness to invalidate Georgia's sentencing scheme suggests that it does not yet recognize devaluation as a form of bias covered by equal protection, at least in the absence of explicit classifications.

C. COVERT GENDER-BASED DEVALUATION OF AN INTEGRATED GROUP

Although not recognized as a legal injury, probably the most adequately theorized type of devaluation is found in the theory of comparable worth. Of the three examples of devaluation I discuss in this Part, comparable worth also seems to be the most difficult for the courts to comprehend and to acknowledge as a type of discrimination. Comparable worth theory was developed to address the problem of the sizable disparity in earnings between male and female workers.[69] It was an attempt to respond to the contention that a large portion of the gender wage gap is traceable to the high degree of gender segregation in jobs[70] and cannot be

69. The wage gap has narrowed in recent years, but is still sizeable. In 1999, women's median annual earnings were 72% of men's, compared to 59% of men's earnings in 1963. *See* NAT'L COMM. ON PAY EQUITY, THE WAGE GAP OVER TIME, http://www.feminist.com/fairpay/f_change.htm (updated Oct. 2000). One comprehensive study concluded that the gender gap in earnings has probably narrowed to the point where women who work a similar number of hours as men earn at least 75% percent of male earnings and probably somewhat more. *See* ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY 56 (1999). The authors predicted that at current rates, it was unlikely that the earnings gap would disappear anytime in the next decade or two.

70. The 1990 census showed that the labor market is still characterized by a high degree of sex segregation. Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 87 (1995). Skilled-trades jobs continue to be heavily dominated by men (e.g., only one in fifty-eight carpenters is a woman; one in twenty welders is a woman). *Id.* The professions are more integrated but still are identifiably male (e.g., 79% of physicians are men; 87% of dentists are men; 76% of lawyers are men). *Id.* at 88. Most women continue to work in low-paying, low-mobility, largely segregated jobs. *See* WOMEN'S BUREAU, U.S. DEP'T OF LABOR, 20 LEADING OCCUPATIONS OF EMPLOYED WOMEN: 1999 ANNUAL AVERAGES, http://www.dol.gov/dol/wb/public/wb_pubs/20lead99.htm (May 2000) (indicating that eleven of the twenty leading occupations for women remain over 70% female, with secretarial work—98.6% female—the leading occupation); DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 141 (1997) (reporting that "women still account for only about 16 percent of full professors in law schools, 13 percent of the partners in the nation's 250 largest law firms, and 8 percent of judges in the federal courts"); JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 66 (2000) (reporting that three-fourths of all working women work in predominantly female jobs).

remedied simply by enforcing the Equal Pay Act's command to pay women the same as men who perform equal jobs.

From its inception in the early 1980s, the strategy behind comparable worth focused on devaluation.[71] Unlike ordinary disparate treatment claims, which center on denying women access to traditionally male jobs (or providing equal pay for equal work), comparable worth claims seek to revalue traditionally female jobs and improve conditions for both men and women in these jobs.

Comparable worth theory rests on the proposition that work perceived as women's work[72] has been downgraded and that the value of work performed in predominantly female jobs—by male and female workers alike—is systematically underrated, given the relative skill, effort, and responsibility involved. Comparable worth advocates rely on job evaluation techniques that measure the worth of the job to an employer, beyond simply relying on the market wage.[73] Most job evaluations of this sort require precisely defining the job, specifying the factors that are relevant to compensation (such as supervisory responsibility and skill), and assigning points based on the level of each compensatory factor. The objective of such an evaluation is to construct a hierarchy of jobs within an organization that reflects the internal value of the jobs. While job evaluation techniques are to some degree subjective and may themselves not be free of gender bias,[74] they have the virtue of requiring employers to be consistent in the factors they identify as important in setting the compensation for both male and female jobs, and they limit the tendency to exaggerate the significance of differences among jobs. To the degree that substantial pay disparities continue to exist between predominantly male

71. For a synopsis of comparable worth theory, see NELSON & BRIDGES, *supra* note 69, at 50.

72. Jobs that are at least 70% female are typically characterized as "women's" jobs. Ruth G. Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REFORM 399, 461–62 (1979).

73. *E.g.*, Deborah L. Rhode, *Occupational Inequality: Pay Equity Reform and the Politics of Legal Mobilization*, 1988 DUKE L.J. 1207, 1228–29 (examining job evaluation, comparable worth and workplace segregation); MICHAEL W. MCCANN, RIGHTS AT WORK 28–31 (1994).

74. Researchers have attempted to reform job evaluation schemes to purge them of inherent male biases. Their studies investigate the list of job factors used to assure that traits, abilities, and skills associated with women are not ignored, particularly when traits, abilities, and skills associated with men are rewarded. Evaluation schemes that give sufficient credit to high-level skills in "care-giving, conflict resolution, and manual dexterity"—undervalued skills associated with women—are being developed. *See* NELSON & BRIDGES, *supra* note 69, at 340 (citing Ronnie Steinberg & W. Lawrence Walter, Making Women's Work Visible, The Case of Nursing: First Steps in the Design of a Gender-Neutral Job Comparison System (1992) (unpublished paper presented at the Third Women's Policy Research Conference, May 15–16, 1992)).

and predominantly female jobs that are rated comparably, the inference is that it is the sex-typing of the job that accounts for the disparity.

Comparable worth theory was tested in the 1980s when large-scale comparable worth studies of public jobs were conducted in several states. The studies documented the existence of substantial disparities in pay—most often on the order of twenty percent—between comparably rated predominantly male and predominantly female jobs.[75] Notably, the empirical research disclosed that the more intensively an occupation was dominated by women, the greater the disparity in wages for both male and female workers in that job category.[76] These studies serve as "proof" of the devaluation of women's work, insofar as they are accepted as a measure of the penalty attributable to the gender coding of jobs.[77]

The theoretical significance of comparable worth lies in its core contention that women's work is judged to be less important, and hence less worthy of compensation, simply because it is mostly women who do such work. The theory claims that the gender of the majority of job holders, rather than the intrinsic demands of the work, influences a job's place in the hierarchy. A kind of vicious cycle operates to perpetuate lower wages for workers in "female" jobs: not only do jobs in which women have been traditionally segregated happen to be lower paying jobs, but they are lower paying, at least in part, *because* they are jobs that have been reserved for women.[78] This cycle explains the phenomenon of "job shifting"—the lowering of pay or prestige when a particular job or occupation changes from being male-dominated to female-dominated. One of the best known

75. NELSON & BRIDGES, *supra* note 69, at 326 (most job evaluation studies show that predominantly female jobs are underpaid by about 20%). *See also* ALICE H. COOK, UNIV. OF HAW. AT MANOA, COMPARABLE WORTH: THE PROBLEM AND THE STATES' APPROACHES TO WAGE EQUITY (1983) (surveying approaches to pay disparity in eighteen states). A more recent study projects that if comparable worth wage adjustments were made in predominantly undervalued female jobs, women's median level of wage would rise 13.2% and the percentage of female to male wages would rise from 72.2% in 1995 to 81.9%. Deborah M. Figart & June Lapidus, *A Gender Analysis of U.S. Labor Market Policies for the Working Poor*, FEMINIST ECON., Fall 1995, at 60, 65 (1995), *cited in* BARTLETT & HARRIS, *supra* note 3, at 306.

76. *See* COMM. ON OCCUPATIONAL CLASSIFICATION & ANALYSIS, NAT'L RESEARCH COUNCIL, WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE 28–29 n.13 (Donald J. Treiman & Heidi I. Hartmann eds., 1981).

77. A four-year study by the Institute for Women's Policy Research of comparable worth measures implemented in twenty states found that, in the comparable worth states, wage ratios between female and male workers rose to 74–88%, compared to a national average of 71% in 1992. *See* Heidi I. Hartmann & Stephanie Aaronsen, *Pay Equity and Women's Wage Increases: Success in the States, a Model for the Nation*, 1 DUKE J. GENDER L. & POL'Y 69, 80 (1994). *See also* Naresh C. Agarwal, *Pay Equity in Canada: Current Developments*, 41 LABOR L.J. 518 (1990) (discussing comparable worth implementation in Ontario, Canada).

78. Blumrosen, *supra* note 72, at 455–57.

examples involves a cross-cultural comparison: Being a physician is a high-status, high-paying job in the United States where men dominate the field; in Russia, where women are far more likely to be doctors, the job carries less prestige and money.[79] In the United States, this shifting phenomenon took place over time in the occupations of secretary and bank teller, which lost prestige when women entered and began to dominate the field.[80] The gender shift from male to female may also take place when work becomes degraded by routinization or mechanization.[81] Or the devaluation may occur simply when the field becomes integrated, even when no change at all occurs in the nature of the tasks.[82]

Sociologists explain the devaluation that occurs in female-dominated jobs as a kind of stereotyping in which assessments of the importance of the type of work are fundamentally influenced by the social value of a typical incumbent in the job. This means that predominantly male jobs still carry more prestige than predominantly female jobs, regardless of the specific content of the work.[83] In this account, devaluation operates at the cognitive level, influencing and shaping categories. The work itself becomes gendered, even though there may be nothing in the tasks of a particular job that make it more suitable for either men or women. As one sociologist described the theoretical model supporting comparable worth: "This is not an argument about discrimination against individuals but against jobs. The argument is that jobs and organizational structure may be fundamentally influenced by gender."[84]

Comparable worth theory thus challenges the cognitive association between women's work and work of low value. Like the race-linked devaluation uncovered by the Baldus study, the injury targeted by

79. CYNTHIA FUCHS EPSTEIN, DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER 152 (1988).

80. BARBARA F. RESKIN & PATRICIA A. ROOS, JOB QUEUES, GENDER QUEUES: EXPLAINING WOMEN'S INROADS INTO MALE OCCUPATIONS 11–15 (1990).

81. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 12 (1979) (noting that automation sometimes converts skilled "male" jobs into unskilled "female" jobs).

82. *See, e.g.*, Patricia A. Roos & Katharine W. Jones, *Shifting Gender Boundaries: Women's Inroads into Academic Sociology*, *in* GENDER INEQUALITY AT WORK 297, 303–14 (Jerry A. Jacobs ed., 1995) (noting that women's representation in the field rose markedly when federal funding for research declined, real earnings decreased, and unemployment rose).

83. *See, e.g.*, PAULA ENGLAND, COMPARABLE WORTH: THEORIES AND EVIDENCE 104–05 (1992); Ronnie J. Steinberg, *Gender on the Agenda: Male Advantage in Organizations*, 21 CONTEMP. SOC. 576 (1992) (book review).

84. Donald Tomaskovic-Devey, *Sex Composition and Gendered Earnings Inequality: A Comparison of Job and Occupational Models*, *in* GENDER INEQUALITY AT WORK, *supra* note 82, at 23, 29.

comparable worth theory is collective in nature, affecting a group of employees (male and female) who work in undervalued jobs and occupations. The undervaluation is not traceable to the sex of the individual job holder, but rather to the sex of the prototypical job holder.

Despite the development of comparable worth theory outside the law, the courts have rejected comparable worth as a theory of liability. In the mid-1980s, a few influential decisions in the lower courts[85] had the effect of halting the filing of comparable worth claims[86] and shifting the movement toward implementing comparable worth through legislative action and collective bargaining.[87] The judicial objections to comparable worth were various, ranging from an asserted lack of judicial competence to handle such wide-ranging claims of disparate pay[88] to an unwillingness to view an employer's reliance on the market rate for a job as a "policy" subject to scrutiny under the federal antidiscrimination laws.[89] At the doctrinal level, the courts insisted that plaintiffs come up with proof of discriminatory animus beyond statistical studies showing that the employer set pay for predominantly female jobs at rates lower than comparable male jobs. The final blow to comparable worth as a legal theory of discrimination was dealt in *American Federation of State, County, & Municipal Employees v. Washington*[90] when the Ninth Circuit held that plaintiffs had not established a prima facie case of wage discrimination under Title VII even though the employer's own job evaluation study indicated that women's wages were devalued.

One contemporary context that is particularly ripe for a revival of a comparable-worth-type challenge involves the sizeable pay disparities between coaches of men's and women's sports teams, particularly at the collegiate level. Coaches of women's teams typically receive far lower

85. The two most important cases were *Spaulding v. University of Washington*, 740 F.2d 686 (9th Cir. 1984), and *American Federation of State, County, & Municipal Employees v. Washington*, 770 F.2d 1401 (9th Cir. 1985). *See also* Am. Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986).

86. One study describes the case law development as the "rise and fall of pay equity as a theory of discrimination." NELSON & BRIDGES, *supra* note 69, at 352. The study concludes that plaintiffs were defeated in these cases because the courts were willing to invoke the market as an explanation of male/female wage differentials despite only weak evidence in the record to support such an explanation. *Id.* at 356.

87. By 1987, twenty states had made some comparable worth adjustments for state employees, but had not extended comparable worth to private employers. *See* SARAH M. EVANS & BARBARA J. NELSON, WAGE JUSTICE: COMPARABLE WORTH AND THE PARADOX OF TECHNOCRATIC REFORM 71–72 (1989). For an analysis of specific case histories, see MCCANN, *supra* note 73, at 68–77.

88. *See Am. Nurses' Ass'n*, 783 F.2d at 720.

89. *See Spaulding*, 740 F.2d at 708–09.

90. 770 F.2d 1401, 1408 (9th Cir. 1985).

salaries and benefits than coaches of the men's teams, even in the same sport.[91] The lower salaries of the coaches of the women's teams are part of the larger, gendered structure of intercollegiate athletic programs and reflect the lower status generally of the women's teams. In addition to coaches' salaries, colleges and universities devote greater resources to men's athletics programs than to women's programs in terms of overall budget, athletic scholarships, recruiting dollars and money spent on equipment, and publicity and training.[92] The lower status of women's sports is then used by universities to justify the pay disparity. When the disparities are questioned, the schools often claim that coaching men's sports is a different (and arguably more difficult) job than coaching the corresponding women's team.[93] So far this argument has served to defeat potential Equal Pay Act claims, which require that the targeted disparity occur in jobs that are substantially equal and not traceable to factors other than sex, such as the number of persons supervised and the size of the program.[94] Moreover, the chances for a successful Title VII challenge on behalf of the coaches of the women's teams are slim due to the simple fact that men as well as women may coach women's teams and are increasingly likely to do so.[95] The reality, however, is that few women are selected to coach men's teams and thus rarely are able to escape the devaluation of women's sports.[96] As Professor Deborah Brake has argued in a recent article on the theoretical underpinnings of Title IX (the federal law prohibiting sex discrimination in educational programs),[97] the pay disparity contributes to the continuing devaluation of women's teams and quite

91. Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, U. MICH. J.L. REFORM (forthcoming 2001) (manuscript at 138–40, on file with the *Southern California Law Review*).

92. *Id.* at 128–32. *See also* B. Glenn George, *Miles to Go and Promises to Keep: A Case Study in Title IX*, 64 U. COLO. L. REV. 555, 557 (1993).

93. *See, e.g.*, Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1321 (9th Cir. 1994) (coaching men's and women's basketball dissimilar based on difference in public relations and promotional activities); Deli v. Univ. of Minn., 865 F. Supp. 958, 961 (D. Minn. 1994) (coaching men's and women's sports dissimilar due to differences in spectator attendance, revenue generation, and media relations).

94. *See, e.g.*, EEOC v. Madison Cnty. Unit Sch. Dist. No. 12, 818 F.2d 577, 581, 584 (7th Cir. 1987); Bartges v. Univ. of N.C. at Charlotte, 908 F. Supp. 1312, 1328 (W.D.N.C. 1995). For a discussion of the Equal Pay Act cases, see Lisa A. Bireline Sarver, *Coaching Contracts Take on the Equal Pay Act: Can (and Should) Female Coaches Tie the Score?*, 28 CREIGHTON L. REV. 885, 890–92 (1995).

95. Brake reports that women now hold less than half of the coaching positions for women's teams. Prior to the passage of Title IX in 1972, women held over 90% of coaching positions on women's teams. Brake, *supra* note 91, at 151.

96. Strikingly, the percentage of women among the coaching ranks of collegiate men's athletics is less than two percent. R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL STUDY—TWENTY-THREE YEAR UPDATE 1977–2000, at 5 (2000).

97. Brake, *supra* note 91.

demonstrably harms female athletes. Neither the harm to the coaches, both male and female, of women's teams, nor that visited on female athletes, however, has yet been considered actionable under the prevailing antidiscrimination laws. The failure to recognize devaluation as a legal injury makes it harder to address sex bias in all-female settings such as women's sports.

Aside from the practical difficulties of implementing comparable worth, a full discussion of which is beyond the scope of this essay,[98] at its core comparable worth theory addresses a kind of devaluation that is not radically different from that found in the "presumption of dependency" cases and in *McCleskey*. The devaluation of women's labor that the Court ruled unconstitutional in the "presumption of dependency" cases bears an obvious resemblance to the devaluation of women's jobs sought to be redressed by comparable worth theory. To be sure, the mechanism of devaluation in the "presumption of dependency" cases was the sex-based statutory scheme itself. Thus, it was self evident that it was the sex of the workers that caused their labor to be worth less to their surviving spouses. In the comparable worth context, by contrast, it is less obvious and more contested that it is the sex of the majority of the jobholders that is producing the depressed pay scale. Whether one is convinced that the gender coding of the job is a cause of the lower pay ultimately depends, of course, on the soundness and persuasiveness of the comparable worth study. My point, however, is that the theory behind comparable worth—that the stereotyping of a job as "women's work" reduces its material value—shares much in common with the "presumption of dependency" cases in which the statutory scheme was premised on the stereotypical assumption that women's labor was secondary and not essential to the welfare of the family.

There is also a similarity between the devaluation of black lives unearthed by the Baldus study in *McCleskey* and the devaluation of women's jobs revealed by comparable worth studies. The regression analysis controlling for important nonracial variables that might justify or otherwise explain the imposition of the death penalty represents an elaborate attempt to compare cases that are admittedly nonidentical. Because no homicide is exactly alike, there will never be the perfect comparison case in which the only difference is the race of the victim. To determine whether devaluation is present, when the mechanism of

98. Some of the objections to comparable worth are canvassed in MCCANN, *supra* note 73, at 31–35 and RHODE, *supra* note 70, at 171–75.

devaluation is the covert abuse of discretion, requires some reliable methodology to group and rank large numbers of cases. The use of a sophisticated statistical method to compare *comparable* cases is also the hallmark of a comparable worth study, which attempts to break down different jobs into factors that can be assigned a given value across jobs. Resorting to some reasonable method to compare nonidentical but similar cases is critically important for the development of antidiscrimination law. Because by definition subordinated groups are not often similarly situated to the majority, there will likely be no perfect comparator, e.g., no "male" job that is exactly like a "female" position but valued more highly.

There is at least one significant respect, however, in which the devaluation complained of by comparable worth advocates differs from the devaluation at issue in both the "presumption of dependency" cases and in *McCleskey*. In the comparable worth context, the category that is devalued (i.e., women's work) is comprised of both male and female workers, and thus devaluation operates to diminish the efforts of a sexually integrated group. In the other two instances of devaluation, the devalued category was exclusively female or minority, respectively. It is true that even in these two instances the effects of devaluation as they reverberated throughout society tangibly affected persons outside the disfavored group, such as the male beneficiaries who were harmed by the devaluation of their deceased wives' labor. But in neither case could it be said that the labor or lives of the dominant group were devalued.

That the devalued category in the case of comparable worth (i.e., people who work in women's jobs) also includes members of the favored group is perhaps what makes this type of devaluation particularly difficult for the courts to comprehend. As the sociological theory stresses,[99] the stereotyping in this context relates to jobs, not to individual women or even women as a social group. With respect to predominantly female jobs, it is the category of "women's work" that is being devalued. With devaluation, it is not enough simply to ask whether the plaintiff would have been treated better if she had been a member of the more privileged group. The gendering of a category, especially when it operates to harm both men and women, may thus seem far removed from the sex-based disparate treatment of individuals addressed by the Equal Protection Clause and antidiscrimination statutes.

The remainder of this Part attempts to specify some of the salient features of devaluation using comparable worth theory as a model. My

99. *See supra* text accompanying note 84.

choice of comparable worth as a model for devaluation is purposeful. By focusing on this more complex and legally controversial form of devaluation, I hope to tease out the features that may not be as visible in the two other, "easier" examples of devaluation.

D. GENERAL FEATURES OF DEVALUATION

The first feature of devaluation that may set it apart from ordinary disparate treatment is that *devaluation seems to operate primarily at the cognitive level.* Devaluation affects the way we value activities, institutions, injuries, and other "things," which, strictly speaking, have no race or gender. Devaluation does not operate directly at the level of the individual or even the social group; rather, it operates to affix a "gender" or "race" to a neutral activity or category and simultaneously to place it on a hierarchy of value. What is devalued is the entire category at issue, whether it is women's work,[100] housework,[101] part-time work,[102] emotional harm,[103] "feminine" behavior[104] or black life.[105] Even when the members of the devalued category consist entirely of members of one social group, like the class of deceased women workers in the "presumption of dependency" cases, the process of devaluation seems directed less at the workers themselves than at the work that they perform. This "denigration of the efforts of women"[106] was one step removed from disparate treatment of women: the direct effects of the devaluation were felt only by the workers' husbands after their death. In this sense, it was their work that was devalued, not their persons.

Gender-based devaluation, however, is closely connected to the kind of gender-based stereotyping of individuals and social groups that often produces disparate treatment. In devaluation, however, it is the mental or cognitive association of the activity with a particular gender or racial group that affects its placement on the hierarchy, for example, making the act of killing a white person a more serious crime than the act of killing a black person. Among the examples of devaluation I have examined in this Part

100. *See* CHAMALLAS, *supra* note 29, at 184–97; ENGLAND, *supra* note 83, at 104–05.

101. *See* sources cited *supra* note 40.

102. *See* WILLIAMS, *supra* note 70, at 72–75 (discussing marginalization of part-time work); Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709, 711 (1986).

103. On the devaluation of emotional harm in tort law, see Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 491–500, 525–26 (1998).

104. *See* sources cited *supra* note 45.

105. *See* sources cited *supra* note 66.

106. Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975).

and in other articles,[107] the critical move seems to be to *match the value of the category to the social value of the prototypical incumbent.* Women's work is devalued in part because it is mostly women who do such work. The gendering of a category, activity, or injury is indeed a kind of stereotyping, in that it focuses our attention selectively on the gender of the actors, obscuring other features that might lead to a different evaluation. Thus, we may tend to notice the gender of secretaries and focus less attention on the conditions under which the job is performed. This process, however, is distinct from saddling a "nonconforming" or "nontraditional" individual with generalizations or stereotypes about her group, which is the more familiar form of stereotyping most often linked to disparate treatment.

Despite its cognitive nature, however, devaluation often has serious material effects. The low/high value assigned to the category has an adverse impact on incumbents and others, giving material effect to the judgments of value. In *McCleskey*, for example, the "race of the victim effect" could make the difference between life and death for criminal defendants. For women workers, the persistence of lower pay scales for predominantly female jobs is a highly significant factor in the gender wage gap that generally makes it more difficult for women than for men to act as breadwinners for their families. As I see it, devaluation as a theory is related to disparate impact theory, because each targets ostensibly neutral policies or categories that produce group adverse impacts and each is interested in eliminating the mechanisms that reproduce disparities in wealth and status for traditionally disfavored groups. As it has developed in Title VII law, however, disparate impact theory has largely been confined to challenging the choice of qualifications for jobs and other discrete policies that screen and sort workers.[108] In contrast, the devaluation discussed here has a broader focus: It is designed to pose a

107. Devaluation of interests and injuries associated with women and racial minorities in tort law is discussed in Chamallas, *supra* note 103, at 463 (1998); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994) [hereinafter Chamallas, *Economic Data in Tort Litigation*]; Martha Chamallas with Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

108. There is some question, for example, whether Title VII disparate impact analysis applies to employment practices other than objective tests and selection devices. *See* Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993) (working conditions); Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161 (7th Cir. 1992) (fringe benefits and compensation policies); EEOC v. Chi. Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991) (passive policies and employer inaction); Beard v. Whitley County REMC, 840 F.2d 405 (7th Cir. 1988) (wage and benefits negotiations); Caviale v. Dep't of Health & Soc. Servs., 744 F.2d 1289 (7th Cir. 1984) (employer's choice of labor pool).

challenge to structural features, like job hierarchies, and basic categories of thought that are distorted by cognitive bias.

The third notable feature of devaluation is that it is often *selective in its operation*, affecting subgroups or subtypes, rather than all members of a disfavored group. Not only do some members of the disfavored group escape the effects of devaluation; they may actually benefit from the process. Thus, the devaluation in the "presumption of dependency" cases, while disadvantaging one subgroup of women (i.e., employed women), produced a relative advantage to another subgroup of women (i.e., widows). Even the devaluation of women's work addressed by comparable worth may work to the advantage of some women in "male" jobs, insofar as they derive a benefit from the overvaluation of male-dominated jobs. This selectivity in impacts, of course, is also present in most cases of disparate treatment. Virtually no gender-based classification encompasses within its reach all groups of women. Instead, such classifications ordinarily select out some group of women for special treatment, leaving other groups of women unaffected and sometimes relatively advantaged. It may well be that the "double-edged sword" quality of devaluation is simply more visible. However, it does seem important to underscore that, at times, devaluation also negatively impacts some members of the favored group if they find themselves part of the devalued category. Male workers in predominantly female jobs presumably suffer the same devaluative injury as female incumbents. Because the gendering (or racing) of a category is keyed to the prototypical member of the category and not to specific individuals, it will often be the case that men whose lives follow "female" patterns will be negatively affected. Although this integrated effect may be hard to classify as discrimination under existing legal doctrine, I believe it is a phenomenon that is fairly well understood in ordinary life. The very fact that we speak of "female jobs" and "black schools" and have little difficulty locating their place on the hierarchy indicates an appreciation for the link between, on the one hand, the racial and gender identification of activities and institutions and, on the other, social value.

The fourth feature of devaluation that marks it as a peculiarly contemporary form of bias is that *devaluation is masked*. In most cases, the bias against a disfavored group that causes or produces the devaluation will not be apparent or encased within explicit classifications. Nor will devaluation operate automatically in every potential case, a fact that sometimes makes it difficult to determine whether the effects of devaluation are felt in a given instance. Instead, there are likely to be plausible neutral reasons for the unfavorable treatment of members in the

devalued class and it will be necessary to examine a large class of cases to determine whether devaluation is operating within the system. Thus, for example, in the comparable worth context, because differences in job tasks and working conditions may well justify a difference in pay rates, those differences must be ruled out before it can be said that gender coding of the job is a cause of depressed wages. As discussed above,[109] the methodology used to tease out bias in complicated systems such as the market for jobs or the criminal justice system will inevitably itself be complex and subject to debate.

That such bias is hard to uncover and document, however, should not be surprising given the nature of contemporary attitudes about race and gender. A recent survey of psychological literature, for example, characterizes racial attitudes in the United States as changing dramatically since the 1940s, such that the perceived norm is now one that favors racial equality. As one psychologist puts it, however, there is a "discrepancy between words and deeds,"[110] documented by experiments that continue to show that whites are less willing to help blacks in circumstances in which they would aid whites and more willing to punish (and blame) blacks in ambiguous situations. The major change in our society may be the change in perceived norms and the driving of racism underground. In an environment where racism is generally regarded as unacceptable, "whites [are] no longer comfortable expressing racism directly [but] express it instead by advocating traditional values and policy preferences that all happened to disadvantage black people."[111] Particularly because it operates at the systemic level, devaluing categories of activities and negatively affecting some members of the favored group, devaluation performs the masking function exceedingly well. Limiting the legal definition of discrimination to intentional disparate treatment virtually insures that the knowledge about hidden biases and subtle racism now studied most intensively by contemporary social scientists will not find its way into the law.

The last feature of devaluation that I extrapolate from my examples is perhaps the most pertinent to any prospects for recognizing devaluation as a legal injury. Despite its differences from disparate treatment, at its core *devaluation is nevertheless comparative.* Ultimately to decide whether a category has been devalued we must ask whether it would be assigned the same value if there were no cognitive association with the disfavored

109. *See supra* notes 73–77 and accompanying text.
110. Fiske, *supra* note 10, at 359.
111. *Id.*

group. The fundamental comparative causation question that drives disparate treatment ("Would the plaintiff have been treated better if she were a man?"; "Would the defendant have been sentenced to death if he were white?") also seems to underlie an analysis of devaluation. The comparison, however, is at a different level. In devaluation, we are interested in comparing classes of activities—such as male and female jobs—or classes of cases—such as homicides involving a single victim committed in the course of another felony—to see whether race or gender as a variable has explanatory power. In the last analysis, however, the default that sets the standard by which devaluation is gauged is the valuation given to categories or activities that are not gendered or raced, because they are associated with whites, men, or other nonmarked "majority" groups. In this respect, devaluation is not a radical departure from disparate treatment, but simply a supplement to the basic comparative approach of the law.

In part because of the conceptual similarity between disparate treatment and devaluation, I see no basis for refusing to treat devaluation as a legal injury in the proper case. When there is convincing evidence that an activity or conduct has been devalued because of its association with women or racial minorities, persons harmed by the devaluation arguably should have a legal remedy.[112] The cognitive bias that underlies devaluation is not so radically different from the stereotyping that in the past provided normative support for explicit gender classifications and that today causes much of the garden-variety disparate treatment of individuals. There is no good reason why the mental image of "things female" or "black life" should convey a meaning of inferiority, deficiency, or lack of value, unless one denies that women and racial minorities are as fully human as white men. Although some people may escape the effects of devaluation

112. Whether the defendant, in a proper case, should be able to assert an affirmative defense such as "business necessity" or some other cost justification to absolve itself of liability is difficult to determine in the abstract. Most often, however, proof that the lower worth of an activity has indeed been caused by its association with the gender or race of the prototypical actor will serve to rule out all (or virtually all) other nondiscriminatory explanations for the evaluation. In this respect, proof of devaluation is most like a showing of class-wide disparate treatment, which rarely can be defended on the grounds that it is too expensive to purge the system of intentional bias. *See* 42 U.S.C. § 2000e-2(k)(1), (2) (1994) ("a demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination"). Devaluation arguably differs from disparate impact theory, which permits defendants to escape liability for *neutral* policies that cause group adverse impact, if they are proven to be necessary to the safe and efficient functioning of the enterprise. *See* 42 U.S.C. §2000e-2(k)(1)(A)(i) (1994) (codifying business necessity defense under Title VII). Because, however, devaluation as I describe it is distinct from both disparate treatment and disparate impact, the availability of defenses is an open question best left to be decided in concrete cases.

by, for example, working in a male-dominated job, devaluation is often no less pernicious than disparate treatment. It can produce substantial, negative material effects and has the vexing capacity to reproduce gender and race disparities that seem to have little to do with a particular individual's gender or race.

If devaluation were more widely acknowledged as a form of bias, legal struggles could center more productively on remedy, where there are often difficult issues of how to go about implementing the goal of neutrality. In its simplest terms, the remedy for devaluation is to upgrade the devalued activity, which most often means treating it the same as the "male" or "white" activity is treated.[113] But removing bias from a system may call for more creative responses. The Baldus study, for example, provided justification for refusing to impose the death penalty in the class of cases in which the danger of the "race of the victim" effect was most pronounced—the midrange cases, which were neither the most aggravated nor the least aggravated.[114] Additionally, the implementation of comparable worth may require more than simply a one-shot pay increase for workers in female-dominated jobs; it may entail some job restructuring and monitoring of pay ranges. Because devaluation is systemic in nature, it may also be hard to tell whether the applied remedy has been effective. One way to discover whether the goal of neutrality has been achieved, however, is to see whether a gender or race association persists. For example, if the job is no longer commonly regarded as a woman's job, it is probably no longer devalued. These remedial complexities, however, should not detract from the basic point of this Article that devaluation is a form of bias that the law should address when a satisfactory remedy can be devised.[115]

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113. In some cases, however, it may be preferable to downgrade the value of the "male" or the "white" activity in addition to upgrading the value of the "female" or "minority" activity. This remedy for devaluation would accomplish equalization by taking away the privilege of the dominant group and setting the new norm at a level that reflects the values of both activities. *See, e.g.*, Chamallas, *Economic Data in Tort Litigation*, *supra* note 107, at 122–23 (arguing that when individualized assessment of damages is impossible, loss of future earning capacity in personal injury cases should reflect the average wages of both men and women, regardless of the gender of the plaintiff).

114. Baldus found that the effects of racial bias were most striking in the midrange cases: 14.4% of the black victim midrange cases received the death penalty, and 34.4% of the white victim midrange cases received the death penalty. McCleskey v. Kemp, 481 U.S. 279, 286 n.5 (1987).

115. It should be noted that the remedy for devaluation need not come from the courts—it may take the form of legislative or regulatory initiatives. Implementation of comparable worth, for example, was accomplished by legislation in Ontario, Canada. *See* Agarwal, *supra* note 77.

III. BIASED PROTOTYPES

In addition to the cognitive bias underlying the processes of devaluation, another recurring theme in feminist and critical race commentary concerns the harmful effects of stock images, mental portraits, schemas, or cultural scripts (all of which I place under the heading of "prototypes") that operate to limit the law's protection of marginal social groups. The literature on rape, for example, repeatedly mentions the stranger-rape prototype and the prototypical rapist, charging that reliance on these prototypes infected legal judgments about criminality and victimization and prevented many date and acquaintance rapes from being classified as "real rapes" and as crimes.[116] Narrow prototypes of this sort often surface in nonintegrated contexts, in which there is rarely a comparable group of male or white victims or affected class members. Discussions of harmful prototypes may arise, for example, when scholars try to explain the effects of gender bias on largely female groups, e.g., bias against welfare mothers.[117] Additionally, the body of literature concerned with prototypes tends to address "second generation" questions, like why reforms in the law, such as changes in rape doctrine and evidentiary rules, have not been more effective and how bias gets reproduced in successive generations. In this Article, I refer to "biased prototypes" to convey the sense that there is something skewed or unfair about reliance on such prototypes in these contexts. I sense that, like devaluation, the use of biased prototypes is a form of cognitive bias that affects judgments of value.

In general, persons use prototypes as "cognitive shortcuts" to help them categorize new cases and situations.[118] When a person "reasons" from a prototype, whether by conjuring up a prototypical victim, offender, or event, he or she searches for a family resemblance between the new case and the prototypical case. The more the new case looks like the prototype (for example, by sharing common features of the prototype), the more likely it will be classified as falling within the category. Resort to prototypical reasoning provides a contrast to the classical model of

116. *See infra* Part III.B.

117. *See infra* Part III.C.

118. *See* Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, 85, 93–95 (1995); Stuart P. Green, *Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach to the Special Part*, 4 BUFF. CRIM. L. REV. 301 (2000). For an accessible discussion of prototype theory and the contributions of major scholars in the field, see GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1987).

classification, in which inclusion within the category is determined by whether the new case fulfills some particular set of necessary and sufficient conditions, e.g., whether the conduct satisfies all the elements of a crime or a cause of action. In the classical model, no one case is more typical or central than any other case; the fixed boundaries of the classical model establish the new case either as falling within or outside the definition. In contrast, boundaries set by prototypes are often graded or "fuzzy"—some cases are seen as more typical than others, as better examples of the category than others. If the new case has many features resembling the prototype, it will be regarded as a good representative of the category, even if those features are not, strictly speaking, necessary for membership in the category according to the classical definition.[119]

The sexism or racism complained about in the biased prototype context is not typically articulated in comparative terms. The basic claim is *not* that, under similar circumstances, men or whites have been (or would be) treated better or even that a category has been devalued because of its association with a low status social group. Thus, the recurring contemporary criticism of rape law, for example, is not that male rape victims are treated better than female rape victims or even that the law against rape would be more stringently enforced if the majority of rape victims were men instead of women (i.e., if rape were not gender-coded as a form of female victimization). Instead, the claim is that the law is interpreted and enforced in a biased way that denies protection to large numbers of female victims, both white and minority, who deserve its protection. In the process, moreover, a message is conveyed that their harm is not real, or substantial, or worthy of legal redress.[120] There is not yet a term in the legal vocabulary that captures this form of bias. I call these cases of "biased prototypes."

At the core of the complaint is that the mental image of the prototypical case (including the image of the prototypical offender, victim or category member) infects the process of judgment in a systematically biased way. The prototype is biased in that it does not reflect the typical or average case. Nor do the features of the prototypical case always map the crucial legal elements of the crime, cause of action, or entitlement to governmental benefits. This skewing can be harmful because reference to the prototype can distort decisions about whether specific instances belong in the category. The critical question is subtly transformed: The

119. *See* Vicki L. Smith, *Prototypes in the Courtroom: Lay Representation of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857, 859 (1991).

120. *See infra* text accompanying notes 130, 142–45.

decisionmaker assesses the similarity of the new case to the prototype, rather than evaluating whether the case fulfills the requirement for membership in the category, i.e., whether the new case fits within the legal definition.[121] Over time, moreover, the existence of the prototype may actually operate to narrow or to alter the legal category if legal commentators and actors within the legal system treat the legal category as if it were bounded by the attributes of the prototype and go on to construct models and rationales centered on the biased prototype.

The legal literature discussing biased prototypes tends to be of the "applied" variety, evaluating a particular prototype in a given context, identifying the ways in which the prototype departs from the typical or recurring case, and suggesting how the prototype subtly serves to reinforce traditional attitudes and ideologies and prevent more thoroughgoing reform of the law and larger society. This Article theorizes more generally about those characteristics of biased prototypes that make them effective in containing social change, particularly how they can function to reproduce gender and race hierarchies in the name of law reform. I focus here on three characteristics, overlapping to some degree, that are highlighted in the three examples of biased prototypes I examine below.[122]

A. THREE CHARACTERISTICS OF BIASED PROTOTYPES

Perhaps the most striking characteristic of the biased prototypes I describe here is their lack of representativeness. Contrary to expectations, *the prototypical case frequently does not resemble the typical case.* It does not mark what is usual (in the sense of average) from what is unusual. Instead, the prototype seems to do its work on the prescriptive or normative level, rather than on the descriptive level. It constructs a line between

121. *See* Lu-in Wang, *The Complexities of "Hate"*, 60 OHIO ST. L.J. 799, 804 (1999) (describing the dangers of reasoning via prototypes).

122. Three other examples of biased prototypes that I do not analyze in this Article but that exhibit the three general characteristics discussed *infra* are 1) the prototype of a stalker as an obsessed fan who stalks a celebrity, rather than the more typical targeting of domestic violence victims, *see* CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN 125–35 (2000); 2) the prototype of the domestic violence victim as a woman suffering from battered women's syndrome who kills her abuser in his sleep, rather than a woman who confronts and resists her abuser and often suffers injury when she tries to leave or refuses to return, *see* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); Nourse, *supra* note 38, at 1345 (1997); and 3) the prototype of sexual harassment as a quid pro quo incident involving a male supervisor making sexual advances toward a female subordinate, rather than pervasive gender-based hostility (of a nonsexual nature) directed at women employees by their male supervisors and coworkers, *see* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686 (1998) (describing the prevailing paradigm).

normalcy and deviancy, between the acceptable and the unacceptable. In the criminal law context, for example, the prototypical offender may be cast as deviant, while indirectly excusing or minimizing the harm done by offenders who do not match the prototype. The prototype can also be influential in constructing a class of "true" or "real" or "worthy" victims, making it harder for those who are injured or affected in ways that do not fit the prototype to have their interests understood or redressed in law. Particularly when the prototype is narrow and covers only a small percentage of cases that arguably could come within a legal category, reliance on prototypes may make it seem reasonable to deny legal protection to a large number of persons, the vast majority of whom will be women or other marginalized social groups. Overall, the danger is that the prototypical may be mistaken for the typical, creating the false sense that the core of the problem has been addressed.

The second dynamic of the biased prototypes I discuss below is that the prototypes reflect or carry with them a theory about the causation of social events. The causal story behind the prototype, the attribution of cause to effect that takes place when the prototype is used to categorize a new case, seems to have a particular structure. *The implicit causal explanation supporting the prototype highlights the character or disposition of the individual actor, and discounts or ignores those situational or social factors that may contribute to or even determine the outcome.* This tendency to attribute behavior to character and not situations, to miss the social context and overemphasize the psychological dimension, is known in the social cognition literature as the "fundamental attribution error."[123] Critical theorists such as Duncan Kennedy describe prototypes as narratives or scripts, in which a "code" provided by the script tells us why the actors behaved as they did. The conventional code of meaning need not follow the actor's actual intention: Instead, the complexity of the actor's actual motivations is eclipsed by the simpler cultural meaning, which emphasizes character traits.[124] Andrew Taslitz explains that prototypes often carry with them scripts (or schemas) that "explain the relationship between social events over time with a causal flavor, early events producing or enabling later ones, much like the scenes in a cartoon strip."[125]

123. FISKE & TAYLOR, *supra* note 44, at 67–72; Fiske, *supra* note 10, at 357, 369–70. *See also* NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 57–58 (2000).

124. DUNCAN KENNEDY, SEXY DRESSING ETC. 133 (1993).

125. Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 416 (1996) (citing RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 34 (1980)).

In law, this causal attribution process can have a profoundly conservative effect. The focus on individual psychology often increases the chance that existing power distributions will remain unchallenged and undisturbed and that victims will be blamed for their own misfortune. It also means that pervasive harm produced by "normal" persons will not be recognized.

Finally, *the prototypes described here, and reasoning by reference to prototypes generally, exacerbate the tendency to frame legal issues in dichotomous terms.* The inquiry boils down to whether the case fits within the prototype or departs from the prototype. This simplified process focuses attention on whether the case before us matches the causal script embedded in the prototype. When the critical task becomes a search for one, exclusive cause of the behavior in question,[126] behavior that is the product of multiple causes gets ruled outside the category. The failure to deal adequately with cases of mixed motivation, a recurring theme in antidiscrimination law, has a disproportionately negative effect on socially marginalized groups who rarely are able to pin down their disadvantage to a single source. Moreover, the search for a discrete, unitary cause of behavior or harm fails to capture the mutually reinforcing relationship between social context on the one hand and individual motivation or character on the other. The disempowerment that accompanies social marginalization is likely to be seen as situated solely within the person, unless the social structures that help make the person "who she is" are exposed and analyzed as relevant in the law.

B. STRANGER-RAPE PROTOTYPE

The best-known example of the distorting effects of a biased prototype involves the law of rape. Despite the movement to reform and strengthen rape laws spearheaded by feminists in the mid-1970s and persisting to this day, it is still probably the case that the incidence of rape has not decreased substantially and that the conviction rate for those charged with rape remains lower than conviction rates for other serious crimes.[127] For

126. This preference for simple causal explanations has been termed the "preference for monocausality" by cognitive psychologists. FEIGENSON, *supra* note 123, at 51–52.

127. CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 159–75 (1992) (noting that rape law reforms have generally not increased the likelihood of conviction, and that reforms have only modestly increased reporting and likelihood of indictment). *See also* STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 17–46 (1998) (discussing disappointing results of feminist-inspired reforms in rape law since the 1970s).

example, Duncan Kennedy speaks of the "tolerated residuum" to describe the quantum of sexual abuse that remains unreported and unpunished.[128]

To explain the disparity between the legal condemnation of rape and the inadequacy of rape law enforcement, many feminist scholars point to the influence of stock images and common misperceptions surrounding the crime of rape.[129] The charge is that a form of cognitive bias has operated to construct a prototype of rape and of the prototypical rapist that does not correspond to most rape victims' experience.[130] The result is that a large portion of behavior that fits the legal definition of rape—forcible penetration without the consent of the victim—is often not regarded or treated as "real rape." Susan Estrich's book *Real Rape* popularized the view that only a narrow class of rape cases has been taken seriously under the law, in both the past and the present. She described the "stranger rape" prototype, the image of rape committed by a stranger who inflicts or threatens physical injury.[131] This image of a man jumping from the bushes to attack a woman is conjured up by the word "rape." The harm of the stranger-rape prototype is not simply that it is underinclusive. Admittedly, no prototype captures the entirety of the category it represents. Rather, the prototype is biased, and causes harm, because of its tendency to redirect our attention from the vast majority of rapes, which are committed by persons who have had some previous acquaintance with the victim.[132] By erasing date, acquaintance, and marital rapes, the stranger-rape prototype

128. KENNEDY, *supra* note 124, at 137.

129. *See, e.g.*, Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 280–86 (1993) (discussing cultural myths about rape, rape victims, and offenders); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1022–31 (1991) (discussing myths about rape victims and offenders).

130. *See e.g.*, LYNDA LYTLE HOLMSTROM & ANN WOLBERT BURGESS, THE VICTIM OF RAPE: INSTITUTIONAL REACTIONS 42–44 (1978) (describing prosecutors' and police officers' notion of the "ideal rape" that is most likely to be prosecuted); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 175 (1989) (discussing societal views of "rapable" and "unrapable" women); Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 73 (1993) (detailing continuum of cultural understanding of rape and consensual heterosexual sex, from "complete stranger, interracial (black on white)" to "mutual desire, love, care, communication"); Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 677–84 (1998) (discussing the cultural paradigm of rape).

131. SUSAN ESTRICH, REAL RAPE 4 (1987). *See also* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1092 (1986).

132. One 1992 study found that only 22% of women reporting rape were raped by strangers. In contrast, 9% were raped by husbands, 10% by boyfriends, 16% by other relatives, and 29% by persons they knew but who were not relatives. NAT'L VICTIM CTR. & CRIME VICTIMS RESEARCH & TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 4 fig.4 (1992). *See also* ROBERT T. MICHAEL, JOHN H. GAGNON, EDWARD O. LAUMANN & GINA KOLATA, SEX IN AMERICA: A DEFINITIVE SURVEY 225 (1994) (reporting that all but 4% of women stating that they were forced to have sex knew the man who was forcing them).

can transform rape from a pervasive phenomenon into an isolated one. Additionally, if rape is conceptualized as being committed by a violent stranger, encounters that do not fit the prototype will tend to be characterized as "consensual," even when there is little evidence that the woman actually wanted to have sexual intercourse.

Andrew Taslitz contends that a familiar theme in the cultural scripts surrounding rape, which supports and explains the reluctance to treat acquaintance and date rapes as "real" rapes, is the theme of bullying. In his view, a "bully" directs his aggression at an opponent who has no real chance of winning (i.e., a totally helpless victim). A perpetrator will be designated a bully only if he displays a great deal of aggression, including physical aggression. A "normal" amount of verbal and physical aggression will be tolerated under male-oriented conceptions of sex as an instrumental activity, a game in which there are inevitably winners and losers. Echoing Catharine MacKinnon's early critique of legal definitions of consent,[133] Taslitz argues that date and acquaintance rapes in which the aggressors use only "acceptable levels" of force are not "real" rapes because they are not committed by bullies. Prosecutors in date rape trials then face the formidable task of portraying the defendant as "a monster, a beast, or, at the very least, a bully."[134]

The stranger-rape prototype also has a racial dimension: The stranger in the prototypical rape is often visualized as a black man who attacks a white woman. Simply by being black, offenders in interracial rapes are often cast as "strangers" as the prototypical rape evokes an implicit racialized image. Although most rapes are intraracial, the black offender/white victim rape produces the strongest legal response, perhaps because it is the prototype. When the offender is black and the victim is white, the rape is more likely to result in a conviction, and black men convicted of rape tend to receive harsher penalties than do other sexual assault defendants.[135] Commentators have noted that the usual

133. *E.g.*, MACKINNON, *supra* note 130, at 174–77.

134. Taslitz, *supra* note 125, at 452–53.

135. *See* GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 132 (1989). The pattern of harsher punishment for black men accused of raping white women simultaneously discriminates against black men and devalues the autonomy and physical integrity of women of color. *See* Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, *in* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 402, 419 (Toni Morrison ed., 1992) [hereinafter RACE-ING JUSTICE, EN-GENDERING POWER]; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1269 (1991) (citing Dallas study showing that average prison term for a man

presumption in favor of treating aggression as consensual sex is reversed when the victim is white and the defendant is black.[136]

The rape prototype may also serve to exceptionalize rape by suggesting that only certain types of men are likely to rape; that is, the prototype of the action becomes linked to a specific kind of perpetrator (prototypical rapist). Katherine Baker characterizes the prevailing view as based on the belief that "rape is different from other crimes because rapists are 'crazy.'"[137] Similarly, Duncan Kennedy believes that the "common popular assessment of sexual abuse" is that it is pathological behavior, quoting Senator Orrin Hatch as stating that abusers are "not normal."[138] This psychopathological model of the rapist oversimplifies the multiple motivations that may cause men to rape. Arguing that not all rapes are alike, Baker asserts that "some rapes are predominantly about sex, some rapes are predominantly about masculinity, and some rapes are predominantly about domination."[139] In a gang rape, for example, men may rape to impress the other men and bring unity to the group (i.e., to reinforce the meaning of masculinity). The motivation for a young date rapist may be more directly linked to a desire for sex, combined with a commodified view of sex that minimizes the harm to the unwilling woman.

The tendency to reduce rapists to mentally ill sadists who have an urge to rape increases the risk of missing the more common scenarios of victimization and fails to convey the pervasiveness and complexity of rape. The prototypical rapist is a deviant individual, whereas many sexual offenders may simply be normal individuals who have committed a serious crime.

A crucial question for scholars is to understand why the prototype diverges from the typical or most common case. In dealing with social categories, social psychologists have noted that people often do not focus on the central tendency (mode, median) but on the extreme or ideal case. The selection of the prototype thus seems to be functional—it performs a

convicted of raping a black woman was two years, as compared to five years for the rape of a Latina and ten years for the rape of an Anglo woman).

136. *See, e.g.*, Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869 (1996).

137. Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 565 (1997).

138. KENNEDY, *supra* note 124, at 138.

139. Baker, *supra* note 137, at 566.

goal or purpose.[140] This does not mean that an individual who resorts to the prototype is aware of the goal or even approves of the goal. Rather, it seems that the rape prototype functions subtly to reinforce certain social hierarchies. First, it reinforces male dominance and female powerlessness by giving (some) men sexual access to women they know. The balance of power in marriage, in intimate relationships between unmarried persons, and even in nonsexual relationships between coworkers or other acquaintances is skewed if women realize that their claims of rape will be met with skepticism. There may also be repercussions beyond the victim and the abusers. The fear of rape curtails women's freedom and their ability to act with confidence in negotiating the risks of everyday life. Even women who have not been raped engage in a variety of self-protective measures or coping strategies designed to prevent rape: One study found that women avoid going out at night without a male protector, wear modest shoes and dress when out alone, and avoid preferred public activities if alone.[141] Many women believe that they can avoid rape (or at least lessen the odds of being raped) provided they do not "assume the risk." In this way, patriarchal norms about the way women should behave (particularly that women should be passive, modest, and under male protection) are reproduced and reenacted, even by those who claim not to embrace the ideology.

The narrow prototype of rape also reinforces white domination by using the threat of a charge of rape against black men to limit their freedom. Because of the racialized history of rape laws and law enforcement, Angela Harris explains that for all black people, men and women alike, "'rape' signified the terrorism of black men by white men, aided and abetted, passively (by silence) or actively (by 'crying rape'), by white women."[142] Jennifer Wriggins further asserts that the racialized prototype harms women of all races by implicitly condoning all but the paradigmatic rapes and contributing to cultural denial that "rape is painful and degrading to both Black and white victims regardless of the attacker's race."[143] The harm of rape is trivialized by seeing it as a justifiable

140. *See* Lawrence W. Barsalou, *Ideals, Central Tendency, and Frequency of Instantiation as Determinants of Graded Structure in Categories*, 11 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 628, 632 (1985) (discussing goal-derived categories).

141. MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR 15–22 (1989).

142. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 599 (1990). *See also* PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 177–78 (1990).

143. Jennifer Wriggins, Note, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 117 (1983) (footnotes ommitted). *See also* Harris, *supra* note 142, at 581.

response to a woman's risky behavior. Although it is commonly said that "no one deserves to be raped," relabeling rape as consensual behavior when the woman's actions depart from that of the ideal victim in effect creates a defense to rape. The "misunderstandings" as to consent in a date rape situation, for example, may involve normative judgments about the propriety of a woman's behavior (e.g., being out at night without a man) that are not directly related to her desire for sexual relations.

Particularly if prototypes do not serve to mark the typical or most common case, they function to set the standard by which others are judged, as implicit theories or judgments about the relative seriousness of acts within a certain category. Thus, there may be the implicit judgment that the more the rape departs from the prototype, the less serious the harm. The crucial question then becomes why, for example, is the rape of a white woman by a black stranger considered to be more serious than an intra-racial date rape? Is it that women have less to fear from men they know, even though empirical evidence indicates that intimates are just as likely to inflict bodily harm?[144] Is it that it is somehow more degrading to have one's wishes disregarded by a stranger, although many women report that it is a devastating experience to be betrayed by a man they trust?[145] Is it that it is worse to be forced to have sex with someone of another race, although surely that attitude would be regarded as racist by most people including rape victims who believe in racial equality? Although these questions are

144. *See* CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 2 (2000) (female victims more likely to suffer violence at hands of an intimate than in an incident committed by a stranger); Dean G. Kilpatrick, Connie L. Best, Benjamin E. Saunders & Lois J. Veronen, *Rape in Marriage and in Dating Relationships: How Bad Is It for Mental Health?*, 528 ANNALS N.Y. ACAD. SCI. 335, 342 (1988) (victims are no more likely to be physically assaulted by strangers than by husbands and boyfriends).

145. *See* ROBIN WEST, CARING FOR JUSTICE 102 (1997) ("[T]he fact that the harm is suffered because of the actions of intimates compounds it: the harm is one of *invasion* as well as violence, and of *betrayal and exposure* as well as fear."); MARTHA C. NUSSBAUM, SEX & SOCIAL JUSTICE 143 (1999) ("[Marital rape] represents a surrender of control over a woman's sexual choices, something modern women view as a serious harm."). Comparing marital rape to stranger rape, one commentary asserted:

> Stranger rape is a devastating one-time occurrence .... Marital rape victims often suffer from a debilitating psychological dependency that ties them to their abusive husbands. Frequently, these wives are also battered. One study found that fifty-two percent of the victims of marital rape suffer severe long-term effects as compared to thirty-nine percent of the victims of stranger rape.

Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1261–62 (1986) (footnotes omitted). *See also* Kilpatrick et al., *supra* note 144, at 343 ("[W]omen assaulted by spouses or dates were just as likely as those assaulted by strangers to be depressed, fearful, obsessive-compulsive, and sexually dysfunctional years after the assault."); Mark A. Whatley, *For Better or Worse: The Case of Marital Rape*, 8 VIOLENCE & VICTIMS 29, 33 (1993) (Marital rape victims "have a hard time trusting men; an increased phobia of intimacy and sex, and a lasting fear of being sexually assaulted again.").

not easy to answer, this is the line of questioning that promises to unearth the cognitive bias in the implementation of rape laws.

By teasing out the value judgments behind "selection" of the prototype, we can begin to perceive the bias that infects the category. One major theme of feminist criticism of rape law, for example, has been that the injury of rape has been conceptualized not as the loss of sexual autonomy, but as the degradation of being "taken" by the wrong man.[146] The rape prototype draws the line between normalcy and deviancy. It normalizes sexual aggression when the man has some relationship with a woman (e.g., as husband, lover, or even boss) and makes it extremely difficult to prosecute such cases. The prototype also subtly determines what is deviant for women. Behavior that departs from the feminine stereotype of appropriate behavior for the modest, passive woman is marked as deviant by taking it outside the law's protection, signaling that the law is reserved for serious injuries to normal women.[147]

The narrow rape prototype also focuses attention on the psychology of the actors in the rape scenario, diverting attention from causal explanations for the rape that would highlight situational or social factors. The fundamental attribution error is evident when a rape is simplistically explained by labeling the rapist as crazy or a bully, or when a rape is denied or diminished by calling the victim promiscuous or vindictive. What is missing from such accounts premised on the character of the actors is the importance of opportunity (e.g., the offender had contact alone with the victim) and disparities in power (e.g., the offender was the victim's employer or husband upon whom she was economically dependent) as causal explanations for the rape. By eclipsing the contexts in which rapes occur and the social factors that contribute to rape, the prototype makes it more difficult to see how rape is related to other forms of violence and abuse of women.

Finally, resorting to the stranger-rape prototype, with its emphasis on physical aggression and violence, tends to exacerbate the already

146. *See, e.g.*, Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993).

147. Lynne Henderson has identified the following "functions" served by the rape prototype (which she calls the stereotype of rape):

> It enables many men who have forced their partners to have sex to distinguish their actions from those of "a rapist"; its threatening horror maintains control over many women's freedom and activity; it allows most men who do commit the crime of rape to go unpunished; and it prevents many women who are raped by men they know from complaining to authorities or seeking counseling, because they fail to meet the societal standard for what it means to have been raped.

Henderson, *supra* note 37, at 133.

pronounced tendency in the law to categorize sexual encounters in dichotomous terms as either "real" rapes or consensual sex. This oversimplified analysis hinders understanding of the many exploitive sexual encounters in which coercive pressure to have sex takes a form other than overpowering physical force. Particularly when the party initiating sex occupies a position of power and trust over the target—as in the increasing number of cases involving doctors, lawyers, drill sergeants, and other professionals who pressure and manipulate those under their care and supervision[148]—reliance on the narrow prototype tends prematurely to label these encounters as consensual sex, missing the often obvious coercive elements that underlie the target's decision to submit. In these difficult cases of professional abuse, the motivation of the perpetrator is particularly hard to pin down and cannot easily be reduced to a singular desire for domination, sexual gratification, or love and intimacy. In such cases of mixed motivation, the departure from the prototype makes it harder to characterize the behavior as rape. Reliance on the narrow rape prototype thus makes it unlikely that legal decisionmakers will have the necessary incentive to examine the facts of particular encounters closely enough to determine whether they fulfill the legal definition of rape or criminal sexual abuse.

C. THE PROTOTYPE OF THE "WELFARE MOTHER"

Another well-theorized biased prototype is most prominent in legal contexts outside of the criminal law. This is the prototype of the "welfare mother." The phrase has become synonymous with a woman who receives AFDC benefits and serves as a contrast to the unmodified or "normal" mother who does not rely on AFDC to support herself and her family. The recent debates over welfare reform at both the state and federal level have focused scholars' and commentators' attention on the cultural image that has become associated with welfare mothers. The negative prototype has a history. The term "welfare queen" was popularized in the 1970s and evoked the negative image of a woman who lives royally "off the dole," acting as if she were entitled to support.[149] Perhaps the most famous invocation of the prototype of the "welfare queen" came during the

148. For a discussion of professional abuse cases, see STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 168–253 (1998) (discussing sexual encounters between employers and employees, teachers and students, doctors and patients, and lawyers and clients); Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 346–50 (1998) (discussing sex between drill sergeants and recruits).

149. *See* Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415 (1999).

testimony of Justice Clarence Thomas at his Senate confirmation hearing. Thomas described his sister, who apparently received AFDC, as being caught up in a culture of poverty. Thomas explained that she was so dependent on welfare that she got angry when the mailman was late with her monthly check and that she had no motivation to do better or change her situation.[150]

Particularly in the last decade, with the concern for "crack babies" and the frequent lament about "children having children," the dominant image of the welfare mother has shifted from "welfare queen" to that of a black, dependent, teenage mother who is dependent on both drugs and welfare. "Welfare mother" now tends to suggest a black woman who has several children and who has never held a job. The prototypical welfare mother defines dependency in our culture and exemplifies a condition that is analogous to an addiction (i.e., drug dependency), separating the dependent individual from self-reliant persons capable of acting in their own interest.[151]

The prototypes of the welfare mother, however, do not accurately describe the average or typical woman receiving AFDC. Fewer than forty percent of AFDC recipients are African American.[152] Most mothers receiving aid are adults, not teenagers: Only approximately eight percent of recipients are teenage mothers, and more than half that group are age eighteen or nineteen.[153] The average family on welfare is not made up of a woman with a brood of children, but includes fewer than three persons, counting the adults.[154] There is also no clear demarcation between welfare mothers and other mothers with respect to the sources of support they receive for their families. Women frequently go on and off welfare between intervals of paid employment.[155] This makes welfare mothers

150. The Thomas quote is cited and discussed in Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means*, *in* RACE-ING JUSTICE, EN-GENDERING POWER, *supra* note 135, at 323, 339, 362 n.6.

151. Nancy Dowd notes that the "pathological label" attached to welfare mothers does not apply to women who are dependent on their husbands within a marriage. NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES 101 (1997) ("[T]he welfare reform rhetoric clearly views dependence on a spouse (marriage) as healthy; it is dependence on the state that is not.").

152. Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 744 (1992) (statistics from 1990).

153. Sylvia A. Law, *Ending Welfare as We Know It*, 49 STAN. L. REV. 471, 482 (1997) (review essay).

154. Minow, *supra* note 43, at 838 (citing 1990 statistics, average AFDC family had 2.9 members, including adults; 72% of all families on AFDC had only one or two children, and almost 90% had three or fewer children).

155. Law, *supra* note 153, at 476. Many welfare recipients also do wage work "off the books" to try to make up for the gap between welfare benefits and family needs. DOWD, *supra* note 151, at 100.

look very much like other mothers, who also frequently engage in part-time or temporary employment.[156]

The biased prototypes of the welfare mother have had a significant adverse effect on the entire group of aid recipients. Feminist scholars have contended that the intensely negative images of the welfare mother have made it easier for governments to enact punitive welfare reform measures and to treat AFDC as radically different from other programs of public subsidies.[157] Although principally affecting public benefit schemes rather than the enforcement of criminal law, the welfare mother prototype, like the stranger-rape prototype, functions to narrow legal protection for this large class of women.[158] In this context, the prototype may have its principal effects on legislators and bureaucrats who create and enforce welfare policy. The prototypes of the "welfare mother" cast families receiving AFDC as deviant and erroneously suggest that normal or "real" families do not receive public subsidies.

The prototype has contributed to the public acceptance and passage of legislation aimed at modifying the personal behavior of welfare mothers. For example, welfare mothers have been given monetary bonuses for marrying the fathers of their children ("bridefare"), have had their welfare payments cut off or reduced if they give birth to children while receiving welfare ("family caps"), and have been threatened with termination of benefits if their children miss more than a specified number of school days ("learnfare").[159] In other families, such decisions about marriage, reproductive choice, and childrearing practices are generally left to the judgment of the parents. Welfare mothers, however, are not permitted to act as heads of their own households with the same authority and dignity as other custodial parents.

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156. *See* WILLIAMS, *supra* note 70, at 2 (reporting that nearly two-thirds of mothers of child-bearing age (between twenty-five and forty-five years of age) do not hold full-time jobs).

157. *See* Minow, *supra* note 43, at 838.

158. The biased prototypes in the rape and welfare contexts do not operate identically. The prototype in the welfare context serves to *discourage* public subsidy, rather than to provide a special justification for legal protection for a narrow class of victims as it does in the prototypical rape scenario. Moreover, all welfare recipients, even those who do not fit the negative prototype, are also disadvantaged because of the negative associations attached to the entire category. Unlike in the rape context, there is no disparity in protection within the category. Despite these differences, however, the "welfare mother" prototype functions much like the "stranger rape" prototype: it normalizes non-AFDC families and obscures the public subsidies received by middle class and other families. *See* Martha Albertson Fineman, *The Nature of Dependencies and Welfare "Reform"*, 36 SANTA CLARA L. REV. 287, 288 (1996) ("We all live subsidized lives....").

159. Williams, *supra* note 152, at 720.

Women on welfare also lose much of their privacy.[160] They are often required to reveal the details of their sex lives as part of paternity proceedings designed to reimburse the state for welfare expenditures by extracting child support from biological fathers. They are subjected to supervision and regular visits by bureaucrats and social workers. The surveillance of welfare mothers and their families is so prominent a feature of these programs that scholars call these families "public" families,[161] stressing that receipt of AFDC funds converts the private family into an overregulated entity in which it is presumed appropriate for the state to intervene.[162]

The negative prototypes of the welfare mother may have also made it possible to enact strict workfare requirements as a condition of receiving AFDC. As long as welfare was associated primarily with aid to widows and largely restricted to white women, it was deemed appropriate for mothers receiving aid to stay home and care for their children. The current hostility toward welfare mothers began to emerge in the late 1960s when the states were pressured to abide by federal requirements that made it more difficult to exclude black women.[163] Early on, limited work requirements were imposed on this new group of AFDC beneficiaries. The insistence that recipients be made to work in order to remain eligible for benefits has culminated in the massive contemporary workfare program, which exempts only women who have children under one year of age.[164] Dorothy Roberts argues that the high value placed on mothers staying home to nurture their children in middle-class families is reversed with respect to families receiving AFDC, reinforcing racist assumptions that, as caretakers, black women have little that is positive to offer to their children.[165]

160. *See* Susan Frelich Appleton, *Standards for Constitutional Review of Privacy-Invading Welfare Reforms: Distinguishing the Abortion-Funding Cases and Redeeming the Undue-Burden Test*, 49 VAND. L. REV. 1, 4–12 (1996).

161. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 178 (1995) (noting that single-mother families are thought of as "public" families justifying state intrusion and loss of privacy).

162. *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 226–29 (1997) (discussing receipt of welfare as a waiver of privacy); Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITT. L. REV. 337, 340, 343–44, 357 (1996) (discussing disproportionate surveillance of families headed by poor women of color).

163. For discussions of racism in the history of welfare, see LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935, at 48, 87 (1994); ROBERTS, *supra* note 162, at 203–08.

164. *See* Brito, *supra* note 149, at 430–35; Roberts, *Black Mothers' Work*, *supra* note 45.

165. Roberts, *Black Mothers' Work*, *supra* note 45, at 872–76.

The ungenerous response to AFDC is not characteristic of all public benefit programs that could properly be classified as welfare programs. Instead only some subsidies are stigmatized, while others are woven into the fabric of mainstream economic regulation.[166] The structure of the current system of social supports has been described as a "two-track welfare system."[167] In marked contrast to AFDC, first-track programs such as old age insurance, unemployment, and benefits for families of veterans are not generally called "welfare" and carry little stigma or dishonor. There are no onerous work requirements attached to these benefits—the surviving spouse of a veteran, for example, is entitled to receive benefits for her children regardless of whether she is employed or is a full-time homemaker. Other first-track programs such as the home mortgage deduction are hidden subsidies that are regarded as entitlements, not welfare.[168]

Overall, the unrepresentative prototype of the welfare mother as single, black, and young sharply differentiates the group from other mothers and obscures a more complex reality in which there is no such clear-cut difference between welfare mothers and other mothers. The subsidy that welfare mothers receive in the form of AFDC benefits is also differentiated from other public subsidies whose first-track status makes them appear more like entitlements than charity. The prototype serves to draw a line bertween normalcy and deviancy, casting welfare mothers as deviant and perpetuating the myth that normal families are fully self-sufficient.

Like the rape prototype, the negative prototype of the welfare mother also emphasizes the character or disposition of the woman receiving aid. As mentioned above, the "fundamental attribution error" is the term used to describe the tendency to attribute the cause of the other's behavior (e.g., being on welfare) as stemming from a fundamental character trait or disposition of the other, rather than as a product of the situation confronting the other. Starting perhaps with the famous 1965 Moynihan Report, a causal link has been drawn among the "breakdown" of the black family, the increasing number of black families on welfare, and the prevalence of families headed by women.[169] Rather than tracing problems in the family to poverty (an external situation or condition), the cognitive move has been

166. *See* Edward J. McCaffery, *The Burdens of Benefits*, 44 VILL. L. REV. 445, 448–50 (1999).

167. Nancy Fraser & Linda Gordon, *A Genealogy of* Dependency: *Tracing a Keyword of the U.S. Welfare State*, 19 SIGNS 309, 321 (1994).

168. *See* Fineman, *supra* note 158, at 288–89.

169. *See* ROBERTS, *supra* note 162, at 16, 202–25.

to attribute the cause of poverty to "deviant" families not dominated by men.[170] A common narrative emerged describing a "culture of poverty" through which welfare mothers transmitted bad values to their children and reproduced dependency in the next generation. Critics of the psychological (dispositional) approach stress that this tendency to address welfare dependency as an individual pathology makes "welfare mothers" a much less sympathetic group and renders invisible the ways in which AFDC families are similar to "working poor" families or middle-class families. The dispositional explanation has proven resilient, despite recurring challenges that it fails to account for contemporary patterns. Sylvia Law, for example, has challenged the empirical basis of the culture-of-poverty thesis and the extent of intergenerational transmission of dependency, citing statistics that indicate that over eighty percent of daughters who grew up in "welfare" homes are not dependent on welfare themselves.[171] Causal attribution is important in interpreting the data: Because poor people are more likely to have children who are poor, it is not surprising that children from welfare homes have a greater likelihood than do middle-class children of being poor as adults and needing public assistance. The critical question is whether poverty (and economic class) is regarded as the cause of welfare dependency, or whether the "culture of poverty," as reflected in the character of welfare mothers, is blamed. The fundamental attribution error perpetuates the view that welfare mothers are the architects of their own misfortune, shifting the focus away from the concrete social situations facing women who receive welfare—the particulars of their lives—to the psychology of the women themselves.[172]

Finally, it is likely that the negative prototype of the "welfare mother" has exacerbated the tendency of policymakers to focus on the psychology and motivation of aid recipients as the sole cause of their continuing need for welfare, obscuring other, more material causes that may prevent welfare mothers from obtaining and retaining jobs. Aid recipients, for example, who suffer violence at the hands of a boyfriend or partner may find it hard to hold down a job because they periodically miss work following incidents

170. Maxine Baca Zinn calls this explanation of poverty and the underclass "the cultural deficiency model" and contrasts it with explanations that focus on the "opportunity structures" in society. *See* Maxine Baca Zinn, *Family, Race, and Poverty in the Eighties*, 14 SIGNS 856 (1989). *See also* DOWD, *supra* note 151, at 18–39 (disputing common beliefs that single-parent families cause poverty and that families lacking a father harm children); Joel F. Handler, *Women, Families, Work, and Poverty: A Cloudy Future*, 6 UCLA WOMEN'S L.J. 375, 402 (1996) (concluding that the "problem" of welfare dependency does not lie in the individuals, but in the job market and conditions of work).

171. Law, *supra* note 153, at 476.

172. *See* Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 575.

of physical abuse. Only recently has domestic violence been cited as an additional cause of welfare dependency,[173] perhaps because of the tendency to ascribe the problem exclusively to the culture of poverty. Moreover, it is possible that, over time, a persistent situational factor, like the threat of domestic violence, may serve to lessen a woman's desire and ability to seek out a job.[174] Such a mutually reinforcing relationship between social context and individual motivation can be obscured by the prototype of the "welfare mother" that seems to speak for itself.

D. THE PROTOTYPICAL "HATE" CRIME

The third example of a biased prototype—the prototypical "hate crime"—is not yet as highly theorized as either the rape prototype or the prototype of the welfare mother. Starting in the 1980s, state and federal legislatures passed statutes enhancing the penalty for criminal conduct in cases in which the defendant selected the victim "because of" or "by reason of" the victim's social group status, most often his or her race, color, religion, national origin, or sexual orientation.[175] Professor Lu-in Wang has asserted that, along with the proliferation of statutes, a prototype of the hate crime has emerged with the following features: In the prototype, the perpetrator(s) and victim are strangers; the perpetrator selects the victim because he hates or despises the social group to which the victim belongs; the crime is characterized by extreme, gratuitous violence or the destruction of property; and nothing of material value is taken from the victim.[176] Despite the use of the label "hate crime" to describe this type of discriminatory conduct, it is not at all clear that "hate" in the sense of animus or hostility toward the individual victim or his or her group is or should be an essential element of the crime. Instead, there is currently a controversy over whether "hate crime" is a misnomer and whether enhancement should apply to a considerably broader category of discriminatory acts not primarily motivated by hate or animus. This is a live legal controversy, because most enhancement statutes require only that there be a causal connection between the defendant's conduct and the

173. On the connection between welfare and domestic violence, see Lisa D. Brush, *Harm, Moralism, and the Struggle for the Soul of Feminism*, 3 VIOLENCE AGAINST WOMEN 237, 248–51 (1997); Joan Meier, *Domestic Violence, Character, and Social Change in the Welfare Reform Debate*, 19 LAW & POL'Y 205, 206–09 (1997).

174. *See* Jody Raphael, *Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency*, 19 HARV. WOMEN'S L.J. 201, 215 (1996).

175. *See generally* LU-IN WANG, HATES CRIMES LAW, §§ 8.01–.04, 10.01–.05 (2000) (summarizing federal and state laws).

176. *See* Lu-in Wang, *supra* note 121, at 802–03.

victim's social group.[177] Some courts and commentators believe that the requisite statutory causal nexus is satisfied when there is a showing of "discriminatory victim selection," that is, in cases in which the victim's race or ethnicity was a substantial or motivating factor in the perpetrator's choice of target, regardless of the perpetrator's subjective feelings toward the victim.[178] Other commentators, in contrast, base their model of hate crimes more closely on the prototype and contend that there should be no enhancement of penalties unless there is proof of racial or other discriminatory animus.[179]

The broader definition of a hate crime captures a wide variety of cases in which the perpetrator targets a socially vulnerable group but arguably acts opportunistically and not out of simple hate. Professor Wang gives the example of a teenager who chooses to rob a grocery store owned by recent immigrants from Asia. The teenager targets the immigrants because he presumes that their difficulties with the English language and isolation from the mainstream community will cause them not to use the local banks and to keep a lot of cash on hand. The perpetrator also predicts that the immigrant owners will be less likely to report the crime and to receive help from the police.[180] Another common example of an opportunistic bias crime is a gay-bashing in which the perpetrator joins his friends in committing the crime to gain social approval from his peer group or to make sure that they will not reject him for refusing to take part in this kind of ritual masculine bonding. Scholars such as Wang, Charles Lawrence, Richard Delgado, and Mari Matsuda believe that such opportunistic offenses deserve enhancement as much as crimes animated by hatred alone.[181] The crux of their argument is that opportunistic offenses produce the same extended harms as "pure" hate crimes. In both instances, there is

177. Most laws follow model legislation drafted by the Anti-Defamation League of B'nai B'rith, which increases punishment where the defendant committed a crime "by reason of the actual or perceived race, color, religion, national origin, or sexual oreientation of another individual or a group of individuals." *See* Lu-in Wang, *Recognizing Opportunistic Bias Crimes*, 80 B.U. L. REV. 1399, 1406 n.47 (2000) (quoting ANTI-DEFAMATION LEAGUE, HATE CRIMES LAWS: A COMPREHENSIVE GUIDE 3 (1994)).

178. *See, e.g.*, People v. Superior Court, 896 P.2d 1387, 1390 (Cal. 1995); People v. Nitz, 674 N.E.2d 802, 806–07 (Ill. App. Ct. 1996); *In re* Welfare of S.M.J., 556 N.W.2d 4, 6–7 (Minn. Ct. App. 1996).

179. *See, e.g.*, Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 339 (1994).

180. Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime* 71 S. CAL. L. REV. 47, 57 (1997).

181. *See* MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÉ WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

harm not only to the direct victims who recognize that their ethnicity or sexual orientation has made them vulnerable to violence, but also to other members of the targeted group who appreciate that they may well be regarded as suitable victims by such "rational" offenders in the future.[182] Wang takes the argument a step further by questioning whether even the prototypical cases are caused solely by hate. She maintains that even the classic case of lynching in the Southern states from 1880 to 1930 is best explained as a product of economic calculation and social power, rather than stemming exclusively from a hatred of blacks.[183] She also attributes the contemporary wave of anti-gay violence (often regarded as the quintessential contemporary hate crime) to a complicated set of perpetrator motivations, including the desire for social acceptance and material gain.[184]

Despite the fact that the legal category of "hate crime" is broad enough to encompass opportunistic offenses, there is a growing tendency to interpret and to enforce enhancement statutes narrowly to reach only hate-motivated actions.[185] A narrow prototype of the hate crime, reminiscent of the stranger-rape prototype, has emerged that excludes crimes committed for mixed motives (e.g., material gain coupled with animosity toward the target group) or crimes for which it is possible to construct some "rational" explanation or purpose for the perpetrator's conduct, such as a juvenile wishing to shock the adult community by defacing a synagogue with a swastika. Law enforcement personnel in particular have tended to embrace this narrow prototype of hate crime, in some cities drafting official department policies limiting the definition of hate crimes to situations in which hatred or bigotry is determined to be the exclusive motive for the crime.[186] Notably, the FBI gnidelines for the classification of bias crimes endorse such a narrow prototype: The guidelines instruct that certain assaults accompanied by a robbery (where property such as a purse or a wristwatch is taken) should not be classified as bias-motivated, even if the

182. Lu-in Wang, *supra* note 121, at 812.

183. *Id.* at 836–67. Wang relies heavily on STUART F. TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE (1995); Jay Corzine, Lin Huff-Corzine & James C. Creech, *The Tenant Labor Market and Lynching in the South: A Test of Split Labor Market Theory*, 58 SOC. INQUIRY 261 (1988).

184. Lu-in Wang, *supra* note 121, at 871–94 (discussing GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN (1991) and GREGORY M. HEREK, *Psychological Heterosexism and Anti-Gay Violence: The Social Psychology of Bigotry and Bashing*, *in* HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 149 (Gregory M. Herek & Kevin T. Berrill eds., 1992)).

185. Lu-in Wang, *supra* note 180, at 128–29.

186. *See* ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIMES: POLICIES AND PROCEDURES FOR LAW ENFORCEMENT AGENCIES 16, 68 (1988).

offender utters a racial or homophobic epithet during the crime.[187] The reasoning is that robbery is not a "real" hate crime because the theft creates ambiguity about the offender's real motives; thus, a mixed-motive situation is implicitly treated as disqualifying. Additionally, the narrow prototype has had considerable influence in the reporting of crimes by media and in the popular discourse. Although the killing of Matthew Shepard has generally been accepted as a hate crime (probably because of its extreme brutality and the anti-gay remarks of the perpetrators), many early newspaper accounts of the murder included the fact that Shepard's wallet was stolen, suggesting that the robbery motive made the case more difficult to characterize than it first appeared.[188]

Reliance on the narrow prototype, rather than on the potentially more expansive legal definition of a bias crime, likely reduces the incidence of reported hate crimes to a significant degree, changing what might be regarded as a major social problem into a relatively isolated phenomenon. Admittedly, there are no empirical data indicating the percentage of opportunistic crimes as compared to pure hate crimes, and thus we cannot know with certainty that pure hate crimes are atypical within the legal category of bias crimes. The prototype, however, very much reinforces the belief that hate crimes are aberrational. The prototype constructs a line between normalcy and deviancy, casting the hate crime perpetrator as deviant, even among the class of criminals. This is because "normal" criminals are thought to act for material gain or some other advantage, while the hate crime perpetrator is portrayed as deviant and irrational and acting out of blind prejudice. The deviancy of the prototypical perpetrator leads to the common perception that hate crimes are rare, aberrational, and isolated incidents. Racial incidents often tend to be described in the news media as "isolated incidents" despite the long history of racial violence in this country and the fact that the violence often follows a common script.[189] The move to narrow the legal category of bias crimes thus fits into the dominant cultural belief that the civil rights and feminist movements of the 1960s and 1970s were successful in eradicating prejudice and that group-based discrimination such as racism is no longer pervasive or systemic.

187. U.S. DEP'T OF JUSTICE & FED. BUREAU OF INVESTIGATION, TRAINING GUIDE FOR HATE CRIME DATA COLLECTION 21–22 (1997).

188. *See* James Brooke, *Men Held in Beating Lived on the Fringes*, N.Y. TIMES, Oct. 16, 1998, at A16.

189. *See* David Bradley, Editorial, *Texas Murder Was a Lynching*, PLAIN DEALER (Cleveland), June 16, 1998, at 9B.

The prototype also eclipses the situational factors that come into play in the perpetrator's choice of victim, putting the focus instead on the perpetrator's character or disposition as a "prejudiced" person. In the hate crime context, the fundamental attribution error operates to obscure how the social context can affect or construct the perpetrator's motivation to target a victim of a particular social group. Wang reports that when social scientists have examined even prototypical hate crimes (notably, lynching and gay bashing), they have concluded that the perpetrator's aversion or animus toward the group is not necessarily a fixed or preexisting state of mind but is connected to the social context in which the crime takes place. When hate is so dissected to expose its social dimension, we can see that

> the social context can sometimes motivate an offender to act on the prejudice of others; the social context can make it both conformist and logical to discriminate in the selection of a victim; and the social context can make discriminating in the choice of a victim conducive to personal gain.[190]

Wang's analysis tracks Iris Young's account of oppression, which describes violence against groups as a "social practice" that is "always at the horizon of the social imagination, even for those who do not perpetrate it."[191] In effect, the larger culture has designated some groups as "suitable victims," making it likely that perpetrators will consider them "easy targets" and be ready to act in such a way as to exploit their social vulnerabilities. For example, gay men are disproportionately susceptible to robbery or extortion schemes because perpetrators often assume that gay men will be reluctant to call the police if the circumstances surrounding the crime (e.g., it took place in a gay bar) might publicly reveal their sexual orientation and often act on the assumption that gay victims will not receive full protection from the police.[192] The social forces that make it risky for gay men to be open about their sexual orientation, and that reduce the support they are likely to receive once victimized, constitute the background against which perpetrators choose individual victims. An "opportunistic" decision to target a gay man in such a case is thus connected to the bias of others in the larger society and to the history of oppression of the group. Reliance on the prototype, however, tends to miss the social dimension of anti-gay bias, leading to an interpretation of an event as either based on personal hate or on a "neutral" cost-benefit

190. Lu-in Wang, *supra* note 121, at 896.

191. IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 62 (1990).

192. *See* Joseph Harry, *Derivative Deviance: The Cases of Extortion, Fag-Bashing, and Shakedown of Gay Men*, 19 CRIMINOLOGY 546, 548–51 (1982).

analysis. What is missing from such an account is an understanding of the psychology of "hate" as a complex phenomenon that is socially reinforced, even in a society that professes to condemn it.

Finally, the prototype of the hate crime reinforces dichotomous thinking, often to the detriment of the groups that are supposed to be protected by the special laws. Because the prototype carries with it an implicit causal story, linked to the character or disposition of the perpetrator, it makes us less likely to search for other plausible causes for the behavior, in the long run contributing to the sense that differing causes (e.g., animus and opportunism) must also be mutually exclusive. As the social science research on gay-bashing demonstrates, the closer we look at the motivation behind human behavior, the more likely we are to find multiple causes. Because social events are often overdetermined and the motivation behind any individual action is largely unknowable, the attribution of causes is a social judgment over which there is likely to be considerable disagreement. In many cases, ascribing an event to "mixed motivations" not only seems sensible, but represents a kind of compromise between contending political forces. For this reason, I suspect that, under scrutiny, many cases will turn out be cases of mixed motivation. It thus becomes crucial how such cases are categorized. Prototypical reasoning pushes in the direction of excluding cases of mixed motivation from the central category, as is evidenced by the practice of law enforcement to consider as bias crimes only those acts motivated exclusively by personal animus or hate. Even when the applicable legislation is silent on how to treat cases of mixed motivation, reliance on the prototype may have the effect of narrowing the category to include only "sole cause" situations.

In addition to ruling out cases of mixed motivation from the central legal category, reliance on the prototype encourages the conceptualization of dual or multiple causes as discrete social forces, missing the mutually reinforcing character of "different" motivations. Thus, psychological research indicates that teenage boys sometimes engage in gay-bashing to seek thrills, recognition from peers, social bonding, or even as a diversion from boredom.[193] In one respect, these motivations appear functional or rational and removed from acts driven by pure or irrational hate, because the perpetrator derives an external benefit from his act and likely would not

193. *See* Karen Franklin, *Unassuming Motivations: Contextualizing the Narratives of Antigay Assailants*, *in* STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 1 (Gregory M. Herek ed., 1998); Karen Franklin, Psychosocial Motivations of Hate Crime Perpetrators: Implications for Educational Interventions, Presentation to the American Psychological Association Annual Convention (Aug. 16, 1998).

commit the act without his peers also being present. In another sense, however, the motivations are not distinct from hate or animus. Precisely because it is the low social regard in which gay men are held in society that makes it permissible for the group to be targeted, the victimization itself may give rise to or reinforce a feeling of repulsion or aversion in the perpetrators. Resorting to the prototype may make it more difficult to see behind the hate to the social forces that help construct individual motivation. Like the fundamental attribution error and the exclusion of mixed-motivation cases, the tendency to view causes as discrete, rather than interactive, contributes to the dominant view of hate crimes as personal acts of brutality unrelated to dominant ideologies and discriminatory patterns of behavior that do not qualify as crimes.

IV. CONCLUSION: COMPARING AND CONTRASTING DEVALUATION AND BIASED PROTOTYPES

My analysis of devaluation and biased prototypes suggests an important link between the two recurring types of contemporary bias. It is significant that each is cognitive in nature, affecting the way we conceptualize and value human behavior and human activities. With respect to devaluation, the cognitive association of the activity with a particular gender or racial group—the gendering or racing of the category—influences how the activity is valued and where it is placed on a hierarchy of value. Thus, predominantly female jobs are marginalized and become less important to the economic welfare of the family and the larger economy because of their association with women. The disparity in imposition of the death sentence sends the message that the taking of a black life is a less serious offense than the taking of white life, that it is somehow less disruptive of the social order.

Similarly, the cognitive bias underlying reliance on narrow prototypes projects important statements about relative value. By drawing a line between normalcy and deviancy, the prototypes distinguish between real crimes (i.e., truly serious behavior) and normal (if undesirable) conduct, suggesting that the law ought only to address the former. Thus, the stranger-rape prototype makes it more likely that the harm of date or acquaintance rape will be minimized and characterized as consensual sex. The emergence of the narrow "hate crime" prototype means that opportunistic criminal behavior intentionally targeting a minority business may not warrant an enhanced sentence, even though the victims perceive that their ethnicity has made them vulnerable to exploitation and that their victimization has had damaging, multiplying effects on others in the social

group. In the context of welfare, the intensely negative prototype of the "welfare mother" works to delegitimize families that receive AFDC, making it seem that this group of mothers has little to offer their children and that subsidies should be limited to "real" families headed by men who hold down jobs. Not unlike the devaluation of behavior and activities that are cognitively associated with women or minorities, biased prototypes serve to devalue the interests of persons whose experiences do not match the prototype, making it harder for them to receive the benefits of legal protection and public subsidy. By subtly signaling who is most deserving of protection, biased prototypes also create a hierarchy of value, one that is often hidden from view in the course of criminal prosecutions, police investigations, and legislative debate.

Interestingly enough, the cognitive moves behind devaluation and biased prototypes seem to pull in somewhat different directions, at least from my perspective as a lawyer studying the conceptual structure of contemporary bias. With respect to devaluation, it is the matching of legal category to the typical or prototypical category member—the convergence of the social value of the incumbents with the value assigned to the activity—that results in the stereotyping of the activity and its depressed worth. The gendering of the category obscures or overwhelms the other more "neutral" features of the activity—it is this selective perception that seems central to the process of devaluation. With respect to biased prototypes, however, it is the divergence of the prototypical case from the typical or modal behavior in the class that is most objectionable. When we are dealing with events that disproportionately affect one gender or principally target minority racial groups (such as rape or hate crimes), the danger is not simply that we will devalue the harms because they are suffered by low-status social groups. Instead, my analysis of biased prototypes suggests that it is the selecting out of the atypical case for special attention that works to the detriment of the larger class of victims or members of the class. The selectivity behind the construction of the biased prototype indirectly signals that the harms suffered by this much smaller group are more serious and perhaps qualitatively different from the negative experiences of the larger group of nonprototypical victims. In this account, skimpy legal protection is not only inadequate; it exacerbates and reproduces the low social value of the group it purports to protect.

The most striking contrast between devaluation and biased prototypes, however, is that the cognitive bias underlying the use of narrow prototypes does not have a comparative structure. The three features of biased prototypes described here (their lack of representativeness; the tendency to

attribute cause to dispositions and character, rather than to situations; and the reluctance to attribute mixed motivations or reinforcing motivations to social actors) do not distinguish them from gender-free or race-free prototypes. In fact, in many instances, biased prototypes tend to downplay the systemic gender or racial dimensions of the injuries. In contrast to devaluation, the remedy for biased prototypes thus cannot take the form of revaluing the harm to make sure it is untainted by the effects of race or gender. For this type of bias, there is no default standard that tells us what equality looks like.

Because of its noncomparative structure, it is difficult to envision how the law might respond to biased prototypes. It is not possible to "ban" the influence of biased prototypes in the law, particularly because they operate on the subconscious level and because we all need to simplify the world by constructing bounded categories, images, and prototypes.[194] Often it seems that the best we can do is to try to expose the underlying normative judgments embedded within the biased prototypes to get at precisely what is objectionable about this kind of cognitive shortcut. When it comes to discussions of remedy for bias of this sort, scholars often resort to exhortations that we need to find ways to promote the development of more diverse images of women's experiences and more resonant stories of the victimization of racial minorities in the hope of loosening the hold of narrowing constructions.[195] In this Article, I confess to the same inability to devise a concrete legal remedy that adequately responds to the harms of biased prototypes.

What can be said, however, is that some interesting scholarly articles addressing biased prototypes have focused on changing the law of evidence as a possible strategy for decreasing the influence of biased prototypes in the litigation context.[196] In the courtroom, the language of lawyers, judges, or even witnesses can highlight or "prime" familiar images in the mind of jurors and increase the chance that jurors will resort to biased prototypes in deciding whether a crime or injury occurred or whether legal protection is warranted. To prevent activation of biased prototypes, exclusionary rules such as rape shield laws are sometimes useful to prevent the jury from receiving information that might lead them to commit the fundamental attribution error and to ascribe the cause of the rape to the victim's

194. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 54–55 (1990) (discussing the inevitability of categorization).

195. *See, e.g.*, Coombs, *supra* note 129 (discussing nonlitigation opportunities for challenging the prototypical sexual assault story).

196. *See* Taslitz, *supra* note 125, at 494–96.

character.[197] There have also been calls for more active intervention on the part of judges to give cautionary instructions[198] and to stop (or at least interrupt) lawyers from making subtle or coded appeals to race or gender,[199] interventions that might cut down on the ability of lawyers to evoke familiar causal scripts.

The remedial suggestions I believe hold the most promise, however, are not those designed to withhold information and to circumscribe legal arguments, but those that expand the kind of evidence that is deemed relevant to the trial of cases. Psychological research by Professor Vicki Smith using mock jurors indicates that when jurors are explicitly confronted with their prior preconceptions derived from crime prototypes and are told how the prototype deviates from the legal definition on a feature-by-feature basis, they show "remarkable improvement" in being able to recognize nonprototypical cases as falling within the legal

197. *See* Orenstein, *supra* note 130, at 684–86 (Rape shield laws "deprive[] the jury of precisely the type of information that feeds rape myths and thereby poisons the narrative."). However, one study indicated that jurors are so strongly inclined to rely on prototypes as an aid to decisionmaking that simply trying to avoid activating the prototypes or instructing the jurors to disregard the prototype has little effect on decisionmaking. Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 LAW & HUM. BEHAV. 507, 532 (1993).

198. *See, e.g.*, Judith Olans Brown, Stephen N. Subrin & Phyllis Tropper Baumann, *Some Thoughts About Social Perception and Employment Discrimination Law: A Modest Proposal for Reopening the Judicial Dialogue*, 46 EMORY L.J. 1487, 1508–14 (1997) (proposing cautionary instruction about stereotyping, prejudice, and discrimination). The authors propose that, in employment discrimination suits alleging race discrimination, the judge alert the jury in the following manner to the danger of stereotyping and to the social context in which the case is brought:

> All of us, no matter how hard we try not to, tend to look at others and weigh what they have to say through the lens of our own experience and background. We each have a tendency to stereotype others and to make assumptions about them. Often we see life and evaluate evidence through a clouded filter that tends to favor those like ourselves. I urge you to do the best you can to put aside such stereotypes, for all litigants and witnesses are entitled to a level playing field in which we do the best we can to put aside our stereotypes and prejudices.
>
> This case, as I have told you, involves Title VII, which is the federal antidiscrimination in employment statute. Congress determined that discrimination against African Americans and others was widespread in our country. Unfortunately, such discrimination is by no means a thing of the past. As you weigh the testimony of witnesses and other evidence, bear in mind that racial discrimination does in fact exist in our society. Of course, that racial discrimination exists in the United States by no means suggests that this defendant discriminated. You must decide the facts about this defendant on the evidence presented in this case. Evidence does exist, however, in a context; and the context includes the regrettable tendency of all humans to stereotype to some extent and the unfortunate reality of continued employment discrimination in our country.

Id. app. at 1531 (footnote omitted).

199. For example, task forces on "bias in the courts" at various state and federal levels have recommended changes in ethical rules to prohibit lawyers from engaging in certain discriminatory conduct in the practice of law. *See* Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781 (1996).

definition.[200] Thus, perhaps the best antidote to counter the influence of biased prototypes is the presentation of "social context" evidence from expert witnesses who can offer data to inform the jury that the prototypical case is not the typical or average case. Evidence addressing the social context of battering, for example, has been used productively in some criminal cases to dispel common images of battered women as crazy or vindictive and to counter misconceptions that women who fail to leave an abusive partner must not have suffered a real injury.[201] Evidence establishing that a rape victim has suffered from rape trauma syndrome provides a reason for a victim's delay in reporting the rape immediately.[202] Similarly, expert testimony has been admitted in sexual harassment cases to explain why victims seldom report harassment to their employers and to describe the various coping mechanisms, short of reporting the incidents, that women employees use to try to manage the problem.[203] Particularly given the propensity to attribute the cause of an event to the character or disposition of the actor, admission of social context evidence of this sort might be useful to dislodge the influence of biased prototypes from jurors' mind and to refocus their attention on the specifics of the case.

Finally, with respect to remedy, it is important to note that although devaluation and biased prototypes qualify as forms of "unconscious" bias, that does not mean that there can be no useful strategies for resisting their effects. Although the cognitive processes underlying devaluation and biased prototypes largely operate automatically, there is evidence indicating that people can control even automatic or unconscious biases if they are given the right kind of information.[204] Under this model, "low prejudice" persons who desire to act fairly can sometimes check the effects of unconscious stereotyping and biased prototypes on their decisions once they are alerted to the potential for bias. Drawing upon this vein of social cognition theory, Professor Jody Armour has described cognitive bias as a

200. Smith, *supra* note 197, at 533.

201. *See* Elizabeth M. Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 496–97 (1996). In cases involving battered women, however, there also has been a trend toward admission of psychological evidence of "battered women's syndrome," rather than testimony describing the social context of battering. This psychologically oriented evidence tends to focus on the pathology of the victim and may well reinforce prevailing stereotypes about battered women. *Id.* at 506.

202. *See* Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 442–47 (1985); Orenstein, *supra* note 130, at 702.

203. *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1505–07 (M.D. Fla. 1991) (admitting testimony of counselor regarding responses of sexual harassment victims), *discussed in* Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 112 (1992).

204. *See* Fiske, *supra* note 10, at 392.

"bad habit."[205] Armour explains that, like all bad habits, the habit of prejudice is hard, but not impossible, to break and doing so requires a conscious effort.[206] He argues in favor of bringing hidden biases out into the open in the course of litigation and permitting lawyers to appeal to the jury's sense of fairness and commitment to equality.[207] Armour's "bad habit" analogy has the great virtue of showing that unconscious biases are not necessarily impervious to legal reforms, including changes in evidentiary rules and other measures designed to counter the effects of biased prototypes.

Despite my attempt to generalize about the features of biased prototypes, I suspect that the best responses to or remedies for biased prototypes will be context-specific, designed to counteract the particular prevailing image that is working to narrow the category in people's minds. Biased prototypes represent a "second-generation" type of bias: They typically emerge after there has been an attempt to address harms of a disfavored social group (e.g., reforming rape law, addressing hate crimes, extending welfare to minority women) and demonstrate the limitations of the law in changing pervasive patterns in the larger culture. The contexts I have investigated in this Article, however, lead me to believe that biased prototypes are not so submerged as to be invisible or beyond detection and correction. As with devaluation, however, naming the type of bias is the easy part. Dislodging cogmitive bias calls for noncomparative strategies that take us quite a long way from the equality-based remedies for intentional disparate treatment.

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205. JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 133–39 (1997).

206. *See id.* at 136 ("[N]onprejudiced responses take intention, attention, and effort.") (quoting Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5, 16 (1989)). *See also* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 754–59 (1995); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1253, 1286–91 (1998) (arguing that to correct the effects of unconscious bias, persons must be aware of their mental process, be motivated to control the bias, and understand the magnitude and direction of the bias) (citing Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgment and Evaluations*, 116 PSYCHOL. BULL. 117, 119–20 (1994)).

207. ARMOUR, *supra* note 205, at 147–53 (arguing in favor of permitting references to a party's (or victim's) race if such reference has the effect of enhancing the rationality of the process and alerting decisionmakers to their own unconscious biases).